

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,742

367

CHARLES KENNEDY,
Appellant

v.

SECRETARY OF THE NAVY,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 8 1968

Nathan J. Paulson
CLERK

(i)

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHARLES KENNEDY,
728 South Smedley St.,
Philadelphia, Pa.,

Plaintiff

v.

SECRETARY OF THE NAVY,
The Pentagon,
Washington, D.C. 20301,
Defendant

Civil Action No. 650-66

COMPLAINT FOR DECLARATORY JUDGMENT
AND INJUNCTION
[Filed May 11, 1966]

The plaintiff, Charles Kennedy, by his attorneys, complaining of the defendant, the Secretary of the Navy, alleges:

1. The Court has jurisdiction of this action under D.C. Code §11-521, under §10 of the Administrative Procedure Act, 5 U.S. Code §1009, and under 28 U.S. Code §2201.
2. The defendant, Secretary of the Navy, is the head of the Department of the Navy and administers the Department of the Navy under the direction of the Secretary of Defense.
3. Plaintiff is a citizen of the United States and a resident of Philadelphia, Pennsylvania.
4. On June 16, 1945, the plaintiff was commissioned Lieutenant (junior grade) in the United States Naval Reserve. He was ordered to active duty on July 10, 1946, and served on active duty from that date to June 8, 1948. On June 8, 1948, the Department of the Navy honorably released plaintiff from active duty, and thereafter transferred plaintiff to the Inactive Status List.

5. From and after June 8, 1948, plaintiff, as an inactive reservist, did not, and was not by law required to, engage in any military activity.

6. On May 23, 1952, the Commandant of the Fourth Naval District wrote plaintiff that that Command had received information casting doubt on plaintiff's loyalty to the government of the United States. The letter did not otherwise describe such information. The letter advised that plaintiff could, on request, have a hearing before a board of officers, the purpose of which hearing would be "to obtain an opinion from officers, believed to be impartial, as to whether there is or is not reasonable ground to doubt your loyalty." The letter stated that if plaintiff desired a hearing, he was required to set forth in writing "the generally outlines of your contemplated defense." The letter further advised that no process existed to compel the attendance of witnesses in plaintiff's behalf, and that at the hearing the "common-law rules of evidence" would not apply and ex parte statements and letters, sworn or unsworn, could be made a part of the record. The letter further stated that if plaintiff did not desire a hearing, he could submit a resignation "for the good of the service" on the express understanding that if such resignation were accepted plaintiff would be discharged from the naval service "under conditions other than honorable." A true copy of said letter is attached hereto, marked Exhibit A.

7. Plaintiff replied to the aforesaid letter that in view of the nature of the proposed hearing he did not desire a hearing. In his reply plaintiff also affirmed his loyalty to the United States and submitted a resignation of his commission as a Lieutenant (junior grade) from the United States Naval Reserve, but stated that such resignation was not submitted "for the good of the service." This resignation was not accepted.

8. On July 31, 1952, the Secretary of the Navy discharged plaintiff from the United States Naval Reserve "under conditions other than honorable for the good of the service." In notifying plaintiff of this discharge, the Secre-

tary of the Navy stated, "This action is taken by reason of doubt cast upon your loyalty to the United States of America as indicated by your membership in, attendance at meetings of, and financial contributions to the Communist Party, U.S.A." No hearing was held prior to the issuance of this discharge.

9. On or about January 20, 1963, plaintiff applied, pursuant to regulations of the Department of the Navy, to the Navy Discharge Review Board for a withdrawal of the discharge under conditions other than honorable and the issuance in lieu thereof of an honorable discharge.

10. The Navy Discharge Review Board thereafter issued a decision, which was reviewed and approved by the Secretary of the Navy, denying plaintiff the relief he had requested. The Board informed plaintiff of this decision on December 10, 1963.

11. The aforesaid discharge of plaintiff from the United States Naval Reserve under conditions other than honorable and the refusal to issue plaintiff an honorable discharge (a) were in excess of the authority of the Secretary of the Navy and the Navy Department; (b) were, contrary to law, not based exclusively on plaintiff's record of military service; (c) violated plaintiff's rights under the First Amendment to the United States Constitution; (d) denied plaintiff both substantive and procedural due process of law, in violation of the Fifth Amendment; (e) were arbitrary, capricious, and an abuse of discretion; and (f) were unsupported by substantial evidence.

12. By reason of the aforesaid actions of the Secretary of the Navy and his subordinates, plaintiff has sustained, and is continuing to sustain, injury to his reputation and to his civilian career, and has been, and will continue to be, deprived of various benefits and rights provided by law for honorably discharged veterans.

13. Plaintiff has exhausted his administrative remedies and has no adequate remedy at law.

WHEREFORE, plaintiff prays for judgment against the defendant (1) declaring illegal, null and void the discharge of plaintiff from the United States Naval Reserve under conditions other than honorable and the refusal to issue to plaintiff an honorable discharge; (2) requiring the defendant (a) to rescind the discharge of plaintiff under conditions other than honorable and to issue in lieu thereof an honorable discharge as of July 31, 1952; and (b) to expunge from the records of the Department of the Navy the determination that doubt had been cast on plaintiff's loyalty to the United States; and (3) providing such other and further relief as may be just and proper.

/s/ JOSEPH FORER
Attorney for Plaintiff

EXHIBIT A

FOURTH NAVAL DISTRICT
DISTRICT STAFF HEADQUARTERS
U.S. NAVAL BASE, PHILADELPHIA 12, PA.

Code 23

C/A8-7/2

Serial 0936-52

23 May 1952

CONFIDENTIAL

From: Commandant, Fourth Naval District

To: Lt. (jg) Charles Kennedy II, USNR.

3927 Locust Street

Philadelphia 4, Pa.

Subj: Notification of suspected disloyal conduct or association.

Ref: (a) BuPers Circular Letter 4-49 of 10 January 1949.

1. This Command is in receipt of information which tends to cast doubt upon your loyalty to the government of the United States. The purpose of this communication is to

apprise you of this fact and afford you an opportunity to appear and be heard before a board which has been convened by this Command composed of the following officers:

LCDR. John E. Kane, U.S. Naval Reserve, 222671/1105
LCDR. James D. Young, Jr., U.S. Navy, 168299/1102
LCDR. Arthur E. Howell, Jr., U.S. Naval Reserve,
151691/1104

2. Should you not desire a hearing, you are advised that you may submit a resignation in tenor as follows:

I hereby submit my resignation from the naval service of the United States for the good of the service, and I request that the same be so accepted. I have been informed and understand that if my resignation for the good of the service which is herein submitted be accepted, I shall subsequently receive a certificate of discharge from the naval service which will state upon its face that it is under conditions other than honorable; that I may be deprived of substantial rights, benefits, and bounties which Federal or State legislation confers or may hereafter confer upon persons with honorable service in, or separation from, the armed forces of the United States; and that I may expect to encounter substantial prejudice in civil life in situations wherein the nature of service rendered in, or the character of separation from, the armed forces may have a bearing.

3. If you desire a hearing you may, by letter addressed to this Command, challenge any or all of the members named setting forth reasons why the member or members challenged are believed biased, prejudiced, or otherwise unable to accord you a fair and impartial hearing.

4. If you desire a hearing, address a letter to this Command indicating that fact and setting forth the general outlines of your contemplated defense. Your failure to adequately set forth the nature of your proposed defense, if it results in surprise to the Recorder may necessitate adjournment of the hearing with consequent inconvenience to you, any witnesses and counsel in having to appear at the adjourned date.

You are further advised that such a statement in this regard will be furnished to the Recorder as an aid to him in preparation for the hearing.

5. If you desire a hearing, you are advised that the Board will meet to consider this matter on the ninth day of June, 1952, unless a reasonable request for postponement to permit you to obtain evidence or otherwise prepare your case is received from you by this Command.

6. Should you desire a hearing, it will be necessary for you to appear at the hearing in person. You may also be represented by counsel of your own choice. Should you so appear in person, such attendance will not be deemed to place you on an active duty status or entitle you to active duty pay or allowances, and there is no provision made by law for the payment or reimbursement for any expenses incurred by you in connection with such hearing.

7. You are further advised that although no process exists to compel the attendance of witnesses in your behalf before the board, any witnesses appearing voluntarily may be examined and cross-examined on all matters germane to the hearing. No provision exists for reimbursement for any expenses incurred by any witnesses in connection with such hearing.

8. You are advised that any hearing held in your case will not be, in any sense of the word, a trial or any adjudication. The common-law rules of evidence do not apply and any ex parte statements and letters, sworn or unsworn, may be freely exhibited to the board by you and the recorder and made a part of the record in your case. The sole purpose of the hearing is to obtain an opinion from officers, believed to be impartial, as to whether there is or is not reasonable ground to doubt your loyalty.

/s/ J. H. BROWN, JR.

Copy to:

LCDR. L. W. Rabb, Jr., USNR, Recorder

ANSWER TO COMPLAINT

[Filed June 1, 1966]

Comes now the defendant, the Secretary of the Navy, by his attorney, and in answer to the complaint herein filed, says:

FIRST DEFENSE

Plaintiff has failed to exhaust his administrative remedies inasmuch as he has not petitioned the Board for the Correction of Naval Records pursuant to 10 United States Code, Section 1552.

SECOND DEFENSE

The complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

Plaintiff's discharge was issued under proper statutory authority.

FOURTH DEFENSE

Plaintiff has been accorded the full extent of his rights both in the initiation and review of his discharge.

FIFTH DEFENSE

Plaintiff voluntarily waived his right to answer allegations concerning his loyalty and to request a hearing thereon. Plaintiff is therefore estopped from now complaining of the procedures utilized in effecting his discharge.

SIXTH DEFENSE

Answering specifically the allegations contained in the numbered paragraphs of the complaint the defendant avers:

1. The defendant admits that the court has jurisdiction to review the administrative proceedings to determine whether plaintiff's discharge was issued in conformity with the controlling statutes and regulations and whether plaintiff was accorded due process of law. The defendant denies jurisdiction for any other purpose.

2-3. The defendant admits the allegations contained in paragraphs 2 and 3 of the complaint.

4. The defendant admits the allegations contained in paragraph 4 of the complaint. The defendant alleges that plaintiff was ordered to report for active duty on July 10, 1946, by orders dated June 3, 1946. The defendant alleges that plaintiff was transferred to the Inactive Status List effective June 1, 1950. The defendant further alleges that plaintiff was appointed an Ensign, United States Naval Reserve, on May 12, 1942, to rank from May 4, 1942; that plaintiff resigned effective May 7, 1943, and enlisted on May 8, 1943, as an Apprentice Seaman, United States Naval Reserve, in the V-12 Navy College Training Program; that plaintiff served and received pay and allowances in that enlisted grade from May 8, 1943, to June 15, 1945, while undergoing medical training at the University of Rochester School of Medicine; that upon being graduated from medical school plaintiff was tendered, under date of June 8, 1945, an appointment as Assistant Surgeon with the rank of Lieutenant (junior grade).

5. In answer to paragraph 5 of the complaint, the defendant admits that plaintiff did not participate in military training activities while on inactive duty in the Naval Reserve, but alleges that plaintiff as a member of the Naval Reserve was subject to the lawful jurisdiction and control of the Department of the Navy over such reserves. The defendant denies all other allegations and conclusions contained in paragraph 5 of the complaint.

6. The defendant denies on the grounds of incompleteness the allegations contained in paragraph 6 of the complaint and alleges that plaintiff's Exhibit A represents the complete text of the May 23, 1952 letter to plaintiff from the Commandant, Fourth Naval District. The defendant alleges that by a prior letter dated July 31, 1951 (a copy of which is attached hereto as Defendant's Exhibit 1), plaintiff was furnished a narrative statement of facts disclosed by investigation, which described plaintiff's alleged conduct

or associations casting doubt on his loyalty, and that plaintiff was accorded an opportunity to submit written answers to interrogatories and/or written statements concerning the matter. The defendant further alleges that by letter dated August 24, 1951 (a copy of which is attached hereto as Defendant's Exhibit 2), plaintiff acknowledged receipt of the July 31, 1951 letter and stated that "prompt action may be expected on my part after counsel has been consulted." The defendant further alleges that plaintiff's letter dated September 13, 1951, subject, "Alleged conduct or association casting doubt upon loyalty; statement in answer to allegations" (a copy of which is attached hereto as Defendant's Exhibit 3), was considered not to satisfactorily rebut or explain such allegations.

7. The defendant denies on the grounds of incompleteness the allegations contained in paragraph 7 of the complaint and alleges that the attached Defendant's Exhibits 4 and 6 represent the complete text of plaintiff's replies to the May 23, 1952 letter from the Commandant, Fourth Naval District. The defendant alleges that by letter dated May 27, 1952 (Defendant's Exhibit 4), plaintiff replied to the May 23, 1952 letter and requested an extension of the proposed June 9, 1952 hearing date "to consider in detail with the advice of counsel the matter of a hearing." The defendant alleges that plaintiff was advised by letter dated May 28, 1952 (a copy of which is attached hereto as Defendant's Exhibit 5), that in view of his request the proposed June 9, 1952 hearing date had been rescheduled for June 16, 1952. The defendant alleges that by letter dated June 13, 1952 (Defendant's Exhibit 6), plaintiff stated, "Having duly considered with the advice of counsel the allegations of disloyal conduct as outlined in reference (a) the nature of the proposed hearing as described in reference (b) I do not desire a hearing."

8. In answer to paragraph 8 of the complaint, the defendant admits that on July 31, 1952, the Secretary of the Navy discharged plaintiff from the United States Naval Re-

serve "under conditions other than honorable for the good of the service." The defendant alleges that the attached Defendant's Exhibit 7 represents the complete text of the July 31, 1952 letter to plaintiff from the Secretary of the Navy. The defendant further alleges that plaintiff, by letter dated June 13, 1952 (Defendant's Exhibit 6), waived the opportunity for a personal hearing before a board of officers and that an additional hearing was not required prior to the issuance of plaintiff's discharge.

9-10. The defendant admits the allegations contained in paragraphs 9 and 10 of the complaint. A copy of the Review of Discharge is attached hereto as Defendant's Exhibit 8.

11. The defendant denies the allegations contained in paragraph 11 of the complaint.

12. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 12 of the complaint and demands strict proof thereof.

13. The defendant denies that plaintiff has exhausted his administrative remedies and alleges that plaintiff has failed to petition the Board for the Correction of Naval Records pursuant to 10 United States Code, Section 1552.

14. The defendant denies each and every allegation in the complaint not expressly admitted, denied, or otherwise qualified herein.

WHEREFORE, the defendant having fully answered the allegations contained in the numbered paragraphs of the complaint, respectfully prays that the complaint herein be dismissed with costs taxed against the plaintiff.

/s/ GARVIN L. OLIVER
Attorney, Department of
Justice, Attorney for the
Defendant

DEFENDANT'S EXHIBIT 1 TO ANSWER

DEPARTMENT OF THE NAVY

Bureau of Naval Personnel

Washington 25, D.C.

In reply refer to
Pers B12f-mm
159421/2105
31 July 1951
Ser No. 092

From: Chief of Naval Personnel

To: Lieutenant (junior grade) Charles KENNEDY, II,
USNR

Inactive 159421/2105

175 Clark Street

Kenmore, New York

Via: Commandant, THIRD Naval District

Subj: Alleged conduct or association casting doubt upon
loyalty opportunity to submit written answers to
interrogatories and/or written statements concerning

Ref: (a) Executive Order No. 1835 of 21 March 1947,
Federal Register, 25 March 1947, Vol. 12, Pages
1935-39

(b) SecNav letter, P1-6, of 10 Jan 1949, NDB 49-15

(c) BuPers CirLtr No. 4-49, Pers-32, P1-6, of 10
Jan 1949, NDB 49-27

Encl: (1) Narrative statement of facts concerning LTJG
Charles KENNEDY, II, USNR

(2) Interrogatories addressed to LTJG Charles
KENNEDY, II, USNR

(3) List of organizations designated by the Attorney
General of the United States, pursuant to refer-
ence (a)

1. Reference (b), promulgated by the Secretary of the Navy
to implement the national policy announced in reference
(a), directs separation from the naval service, in accordance

with applicable statutes and regulations, of members thereof whose conduct or associations cast doubt upon their loyalty. Reference (b) sets forth conduct or association which may be considered as establishing reasonable grounds for separation of personnel of the naval service, including:

"2. . . .

* * *

"f. Membership in, affiliation with, or sympathetic association with, any foreign or domestic organization, association, movement, group or combination of persons,

(1) Which practices, seeks to practice, or advocates:

"(b) Alteration, through or with the aid of force, violence, or intimidation, of the existing form of government of the United States or territory subject to its jurisdiction or of the existing economic, social or political order within it.

(2) Which (regardless of practice, advocacy, or non-advocacy of any of the tenets set forth in (1) (a) and (b) above) is disclosed by investigation or designated by the Attorney General to be totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means."

2. Reference (b) authorized and directed the Chief of Naval Personnel to establish and promulgate to the naval service detailed procedures for the handling of cases involving allegations that members of the naval service have engaged in conduct or associations casting doubt upon their loyalty. Reference (c) was promulgated pursuant to that directive.

3. It has been determined in accordance with reference (b) that there is sufficient credible, concrete, and factual evidence available to establish, prima facie, conduct or associations on your part similar to those described in the portion of paragraph 2 of reference (b) which is quoted in paragraph 1 above. In accordance with reference (b), there has been prepared a narrative statement of the facts as indicated by investigation, pertaining to such conduct or associations. Written interrogatories prepared in accordance with paragraph 4 of reference (b), are herewith forwarded to you, with a view toward giving you an opportunity to present, in a logically coherent and factual manner, matter within your knowledge, corroborating, explaining, expanding, or tending to refute, assertions made, or inferences arising from assertions made, in the narrative statement.

4. The Chief of Naval Personnel has caused to be made a careful review of material relating to investigative findings concerning you, and has determined that the material reveals the existence of sufficient concrete factual evidence of conduct or association on your part of the character described in paragraph 2 of reference (b), that were such conduct or association an offense triable before a court martial, a legally valid specification could be drawn setting forth such offense and a prima facie case established by evidence in support of such specification.

5. Accordingly, enclosures (1) and (2) are forwarded to you herewith, as prescribed in paragraph 1 A of reference (c). You are informed that you are at liberty to refuse to submit written answers to the interrogatories directed to you. You are further informed that you may submit such written statement as you may see fit concerning the assertions made in enclosure (1). You are also informed that you may consult counsel respecting this letter and enclosures. Contents of this letter and enclosures may be revealed only to your counsel and naval authorities properly entitled to be cognizant thereof. If you do not desire to submit either or both answers to interrogatories or any statement,

it is directed that you promptly signify such fact by letter addressed to the Chief of Naval Personnel, via the Commandant, Third Naval District. Otherwise, acknowledge receipt of this letter, indicating within what reasonable period of time answers to interrogatories and/or statement will be prepared and forwarded to the Chief of Naval Personnel.

6. In the absence of any communication from you, further action under reference (c) will be held in abeyance for a period of 45 days from the date of this letter. Should you indicate that you do not desire to submit written answers to interrogatories and/or a written statement, further action under reference (c) will be initiated immediately upon receipt by the Chief of Naval Personnel of such indication. Should you indicate that you desire to submit written answers to interrogatories and/or a written statement, a period of 60 days, from the date of mailing of this letter to you by the Commandant, will be allowed therefor, which period may be extended by the Chief of Naval Personnel, in his discretion, upon your written request for an extension for a specific reasonable period, setting forth good cause therefor. If statement and/or answers to interrogatories be not received within period specified, further action under reference (c) will be initiated forthwith.

R. R. CONNORS

By direction

Copy to:

Director of Naval Intelligence

NARRATIVE STATEMENT OF FACTS
DISCLOSED BY INVESTIGATION

Subject: LTJG Charles (n) KENNEDY, II, USNR (Inactive)
159421/2105

1. There is reliable information that Charles KENNEDY has been a member of the Communist Party, USA since 1946. The Communist Party, USA has been proscribed by the United States Attorney General pursuant to Executive Order 9835 as a Communist organization, a subversive organization and one which seeks to alter the form of government of the United States by unconstitutional means.
2. Charles KENNEDY has attended meetings of the Communist Party, USA in New York and Connecticut since 1946. The Communist Party, USA has been proscribed by the United States Attorney General pursuant to Executive Order 9835 as a Communist organization, a subversive organization and one which seeks to alter the form of government of the United States by unconstitutional means.
3. In 1948 Charles KENNEDY made financial contributions to the Communist Party, USA. The Communist Party, USA has been proscribed by the United States Attorney General pursuant to Executive Order 9835 as a Communist organization, a subversive organization and one which seeks to alter the form of government of the United States by unconstitutional means.
4. Charles KENNEDY is known to have attended Communist Party social functions in Connecticut during 1949. The Communist Party, USA has been proscribed by the United States Attorney General pursuant to Executive Order 9835 as a Communist organization, a subversive organization and one which seeks to alter the form of government of the United States by unconstitutional means.
5. Reliable information indicates that Charles KENNEDY has been active since 1947 in the affairs of the Progressive Citizens of America. The Progressive Citizens of America was cited in 1947 by the California Committee on Un-

American Activities as a new and broader Communist front for the entire United States. The Communist Party, USA has been proscribed by the United States Attorney General pursuant to Executive Order 9835 as a Communist organization, a subversive organization and one which seeks to alter the form of government of the United States by unconstitutional means.

6. Charles KENNEDY is known to have participated in the formation of a Marxist discussion group during 1946. Marxism is the basic philosophy of the International Communist Movement. The Communist Party, USA is one of the instrumentalities of that movement. The Communist Party, USA has been proscribed by the United States Attorney General pursuant to Executive Order 9835 as a Communist organization, a subversive organization and one which seeks to alter the form of government of the United States by unconstitutional means.

INTERROGATORY

Subj: LTJG Charles (n) KENNEDY, II, USNR (inactive),
159421/2105

1. What is your name, date and place of birth, and present duty station? Have you ever used any name other than Charles KENNEDY? If so, explain fully your reasons for doing so.
2. State your rank, file number and present status in the U. S. Navy.
3. What is your marital status? If married, give your wife's full name, her present employment, if any, her former employments, date and place of marriage and list all persons financially dependent upon you for support.
4. List all places of employment, dates thereof, type of work done, names of your immediate supervisors and all periods of unemployment and reasons therefor since 1930.

5. List all educational institutions attended, including grammar school, high school, colleges, study groups (formal and informal), service schools and special courses attended, giving dates thereof. Describe courses studied at all places after grammar school. List diplomas, certificates or degrees received. Describe your extra-curricular activities at all schools or study groups after grammar school, including fraternities, social or other organizations or activities and associates therein.

6. Have you ever at any time in your life been apprehended by civil or military authorities, if so, for what offense or offenses? Explain fully. Have you ever been convicted of any of these offenses? Explain fully.

7. Reliable information indicates you have been a member of the Communist Party, USA since 1946.

a. When did you first become interested in the principles of Communism? When did you first become a member of the Communist Party, USA? Who recruited you? What type of indoctrination were you given? Describe the indoctrination techniques used and study materials covered. List all the organizational units of the Communist Party, USA of which you have been or are now a member and indicate the inclusive dates of your participation in the activities of each of these organizational units. List all the Communist Party book and card numbers, party aliases and any other identification which you have used as a member of the Communist Party, USA.

b. Have you ever held an executive office in the Communist Party, USA? If so, what offices have you held in the past and what were the inclusive dates during which you held these offices? What executive offices do you now hold and when did you first assume these offices? Give a detailed analysis of your responsibility in each case to higher authority in the Communist Party, USA. Who have been your supervisors and how many people have you had under your supervision in each case?

c. Are you in accord with the basic principles of Communism as expressed in the current Moscow interpretation of the Marxian philosophy? In view of the frequent shifts in Communist Party line to coincide with proclamations issued in Moscow, do you feel that the stands taken by the Communist Party, USA on important issues of the day represent an expression of the free will of Party members? Are you in accord with the principles of world revolution as incorporated in the Communist Party philosophy? Do you feel that the Communist Party is justified in seeking the overthrow of the Government of the United States by force and violence? Explain your answers in detail.

d. Do you object in any way to the basic capitalist system of the United States? If so, list your objections and state your reasons therefor.

e. What is your opinion of the national and local legislation which provides the means for controlling subversive activity within the United States? Do you feel that no controls should be exercised over organizations which preach the Communist doctrine of world revolution? If you object in any way to the spirit of this legislation, list your objections and your reasons therefor.

8. You are known to have attended meetings of the Communist Party, USA in New York and California since 1946.

a. When and where have you attended meetings of the Communist Party, USA? Who were the members of the Communist Party in attendance at these meetings? List their names and addresses. Were members of the Communist Party indoctrinated in the principles of world revolution at these meetings? Were these meetings open to the public and were they publicly announced in advance? If not, explain the reason or reasons for secretiveness in the management of Communist Party affairs. What topics were discussed at these meetings?

9. You are known to have made financial contributions to the Communist Party, USA in 1948.

a. List the dates and amounts of each of your financial contributions to the Communist Party. Who in the Communist Party, USA received your contributions? Are Communist Party funds collected through regular Party appeals, or does the Party meet its operating expenses with spontaneous contributions from Communist Party members and sympathizers?

10. You are known to have attended Communist Party social functions in Connecticut during 1949.

a. When and where were these social functions held? What were the purposes for which each was held? Who were the members of the Communist Party in attendance? Were these social functions used to interest prospective members in the activities of the Communist Party, USA?

11. You are known to have been active in the affairs of the Progressive Citizens of America since 1947.

a. When did you first become interested in the activities of the Progressive Citizens of America? Who interested you in this organization? Are you now or have you ever been a member of the Progressive Citizens of America? If so, list the inclusive dates of your membership in this organization. For what purpose or purposes does this organization exist? Do you feel that this organization serves any purpose other than to act as a cover under which Communist Party activities are carried on? Who are the members of the Progressive Citizens of America with whom you have been most closely associated during the period of your participation in the activities of this organization?

12. You are known to have participated in the formation of a Marxist discussion group in 1946.

a. Describe the role you played in the formation of this Marxist discussion group. What end did you feel would be served by the organization of such a group?

b. What are the economic, sociological and political concepts of the Marxist philosophy which you feel to be most valid? Do you feel that adherence to such a concept repre-

sents disloyalty to our democratic form of government, our heritage and our way of life? What is your opinion of the "Titoist deviation" from the Moscow interpretation of Marxism? Explain your answers in detail.

13. Upon entering the Naval Reserve you took an oath in which you swore or affirmed to "support and defend the Constitution of the United States against all enemies, foreign and domestic", to "bear true faith and allegiance to the same", and you indicated that you took "this obligation freely without any mental reservation or purpose of evasion".

a. In view of the fact that you are still bound by this oath as a member of the Naval Reserve, how can you justify your participation in the activities of organizations which are dedicated to the overthrow of the constitutionally established form of Government of the United States by force and violence.

14. Are you now, or have you ever been, a member of, prospective member of, contact of, or associated with, any of the organizations proscribed by the United States Attorney General on the list of organizations issued pursuant to Executive Order 9835 (See Appendix (a)).

(Attorney General's List of Organizations Issued Pursuant to Executive Order 9835 omitted in printing.)

DEFENDANT'S EXHIBIT 2 TO ANSWER

24 August 1951

From: Lieutenant (junior grade) Charles KENNEDY, II,
USNR (Inactive) 159421/2105
3927 Locust Street
Philadelphia 4, Pennsylvania
To: Chief of Naval Personnel
Via: Commandant, THIRD Naval District

Subj: Acknowledgment of receipt of confidential letter

Ref: (a) Pers B12f-mm 159421/2105 dtd 31 July 1951
ser no. 092

(b) First Endorsement of Ref (a) by ConThree
DHq-01/stk dtd 6 August 1951.

1. Acknowledgment is made of receipt of confidential letter. Ref (a)
2. Prompt action may be expected on my part after counsel has been consulted. Due to circumstances peculiar to my present life situation I cannot predict the exact length of time necessary for me to take such action. Should it prove to be longer than the time allowed as designated in reference (a) paragraph 6 of the basic letter I will request an extension by communication with the Chief of Naval Personnel.
3. I wish to confirm previous notices to the Commandant of the THIRD Naval District dated 10 September 1950 and 29 June 1951 of Changes of Address: 175 Clark Street, Kenmore N.Y. to The Children's Hospital, 219 Bryant Street, Buffalo 22, N.Y. and thence from the latter to 3927 Locust Street, Philadelphia 4, Pa. respectively.
4. In the light of change of address noted in paragraph (3) I wish to be informed whether future communications shall be sent via the Commandant of the FOURTH Naval District or as previously via the Commandant of the THIRD Naval District.

/s/ Charles Kennedy, II
Charles Kennedy, II

DEFENDANT'S EXHIBIT 3 TO ANSWER

13 September 1951

From: Lt (jg) Charles KENNEDY, II, USNR (Inactive)
159421/2105
3927 Locust Street
Philadelphia 4, Pa.
To: Chief of Naval Personnel
Via: Commandant, THIRD Naval District
Subj: Alleged conduct or association casting doubt upon
loyalty; Statement in answer to allegations.
Ref: Pers B12f-mm 159421/2105 dtd 31 July 1951 Ser
No. 092

1. It is a source of extreme consternation to me to receive the confidential letter from the Bureau of Naval Personnel in which my loyalty to my country is being questioned. From the moment of my first official association with the Navy over nine years ago the welfare of my country has been of very deep concern to me. My oaths of office in my commissioning as Ensign and later as Lieutenant junior grade were not taken lightly; on the contrary I was deeply aware of the responsibility placed upon me as I assumed a position of leadership in the defense of our country. To the best of my knowledge and ability I have indeed supported and defended the Constitution of the United States against all enemies, foreign and domestic and I have born true faith and allegiance to it. My only regret is not having had the opportunity to have been of greater service during the war time.

2. Whatever significance may be assigned by others to my past political thinking or actions I categorically deny that I have ever advocated the violent or forceful overthrow of the United States Government and I have not knowingly associated with any individual who has advocated this. On the contrary I deeply deplore violence in any form as it is used as a solution to the problems of human relations.

3. However, if the Navy Department feels that it is necessary that I be separated from the service I am willing to resign my commission as Lieutenant junior grade, and I hereby do so. In this resignation, however, I wish to reaffirm my loyalty to the constitution of the United States and this affirmation is free of "any mental reservation or purpose of evasion".

4. If my services as a physician can be of value to the Navy in any way in the future, I wish to be called upon.

/s/ Charles Kennedy, II
Charles Kennedy, II

DEFENDANT'S EXHIBIT 4 TO ANSWER

27 May 1952

From: Lt (jg) Charles Kennedy II, MO, USNR, 159421
3927 Locust Street
Phila, 4, Pa.

To: Commandant Fourth Naval District

Subj: Suspected disloyal conduct

Ref: Code 23
C/A8 - 7/2
Serial 0936-52

1. This is to acknowledge receipt of reference (a) on 24 May 1952.
2. Considering the gravity of a situation of this kind I wish to be granted a period of time to consider in detail with the advice of counsel the matter of a hearing. Should a hearing prove advisable in my case I feel that the proposed date of June 9th 1952 would not allow me nearly adequate time for preparing an outline of my defense.

3. In view of the several pressures on me as a physician with a family I should be most grateful for leniency in terms of a time allotment.

/s/ C. Kennedy, M.D.
C. Kennedy, M.D.

DEFENDANT'S EXHIBIT 5 TO ANSWER

FOURTH NAVAL DISTRICT
DISTRICT STAFF HEADQUARTERS
U.S. Naval Base, Philadelphia 12, Pa.

Code 23
C/A8-7/2
Serial No. 0965-52

28 May 1952

From: Commandant, Fourth Naval District
To: LTJG Charles Kennedy II, USNR
3927 Locust Street
Philadelphia 4, Pa.

Subj: Request for postponement of Loyalty Board hearing.

Ref: (a) LTJG Charles Kennedy II ltr to Com4 dtd
27 May 1952.
(b) Com4 ltr Code 23 C/A8-7/2 ser 0936-52 dtd
23 May 1952.

1. Reference (a) has been received.
2. In view of your request in reference (a) for postponement of the date scheduled for a loyalty hearing, should you desire one, the Board referred to in reference (b) will meet on June 16 to consider this matter instead of June 9. If you wish a further postponement, you may appear before

the Board on that date at 9:00 a.m. at the District Legal Office, Building 734, Naval Base, Philadelphia, Pennsylvania, and show cause for a further postponement.

J. H. BROWN, JR.,
Rear Admiral, U. S. Navy,
Commandant, Fourth Naval
District.

Copy to:

LCDR John E. Kane
LCDR James D. Young
LCDR Arthur E. Howell
LCDR L. W. Rabb, Jr.,
USNR, Recorder.

DEFENDANT'S EXHIBIT 6 TO ANSWER

13 June 1952

CONFIDENTIAL

From: Lt. (jg) Charles Kennedy II, 159421, MC, USNR
3927 Locust Street
Phila 4, Pa.

To: Commandant, Fourth Naval District

Subj: Letter of resignation

Ref: (a) Pers B12f-mm, 159421/2105, dtd 31 July 1951,
Ser. no. 092
(b) Code 23, C/A8-7/2, Serial 0936-52, dtd 23 May
1952
(c) My letter to Chief of Naval Personnel dtd 13
Sept 1952
(d) Code 23, C/A8-7/2, Serial No. 0965-52, dtd
28 May 1952

1. Having duly considered with the advice of counsel the allegations of disloyal conduct as outlined in reference (a) the nature of the proposed hearing as described in reference (b) I do not desire a hearing.

2. I wish to call the attention of the Command to reference (c).

"1. It is a source of extreme consternation to me to receive the confidential letter from the Bureau of Naval Personnel in which my loyalty to my country is being questioned. From the moment of my first official association with the Navy over nine years ago when I was commissioned as Ensign, H-V(P) the welfare of my country has been of very deep concern to me. My oath of office was not taken lightly; on the contrary I was deeply aware of the responsibility placed upon me as I assumed a position of leadership in the defense of our country. To the best of my knowledge and ability I have indeed supported and defended the Constitution of the United States against all enemies, foreign and domestic and I have born true faith and allegiance to it. My only regret is not having had the opportunity to have been of greater service during the war time.

2. Whatever significance may be assigned by others to my past political thinking or actions I categorically deny that I have ever advocated the violent or forceful overthrow of the United States Government and I have not knowingly associated with any individual who has advocated this. On the contrary I deeply deplore violence in any form as it is used as a solution to the problems of human relations."

3. Under the present circumstances I resubmit my resignation as Lieutenant (junior grade) in the United States Naval Reserve once more affirming my loyalty which is free of "any mental reservation or purpose of evasion" to the constitution of the United States.

4. I therefore cannot accept that my resignation is "for the good of the service." Furthermore that I should incur any penalty through the character of my separation is grossly unjust and totally out of character with the service I have rendered.

5. Again I wish to state that if my services as a physician can be of value to the Navy in the future, I wish to be called upon.

/s/ Charles Kennedy
C. Kennedy

DEFENDANT'S EXHIBIT 7 TO ANSWER

159421/2105
Pers-B1136-IMH-2
JUL 31 1952

From: Secretary of the Navy
LTJG Charles KENNEDY, II, (MC), USNR
3927 Locust Street
Philadelphia, Pa.

Via: Commandant, FOURTH Naval District

Subj: Discharge from the U. S. Naval Reserve under conditions other than honorable

Ref: (a) Art. H6202, BuPers Manual, 1948

Encl: (1) Discharge Certificate

1. Pursuant to the provisions of reference (a), and by direction of the President, you are hereby discharged from the U. S. Naval Reserve under conditions other than honorable for the good of the service, effective this date.

2. This action is taken by reason of doubt cast upon your loyalty to the United States of America as indicated by your membership in, attendance at meetings of, and financial contributions to the Communist Party, U. S. A. Your statement, submitted in response to these allegations, has been reviewed and it is considered that it does not satisfactorily explain or refute the foregoing. It is noted that although you were advised that your statement was not considered satisfactory, you failed to avail yourself of an opportunity afforded you for a personal hearing before a board of officers convened by the Commandant, FOURTH Naval District.

3. Please acknowledge receipt to the Chief of Naval Personnel (attention Pers-B1136), via the Commandant, FOURTH Naval District.

Francis P. Whitehair
Acting Secretary of the Navy

Copy to:

VA (Life Ins.)

BuMed (PQ Branch)

FldBr, BuSandA (2)

OiC, NavResOffPerformance

RecordingActy, NavPersCen

Omaha, Nebr.

BuMed-36

Jacket copy

Pers-B111s

E111a (#1)

B11183

B13a

B112

B1136

B12f

B114a



DEFENDANT'S EXHIBIT 8 TO ANSWER

REVIEW OF DISCHARGE
NAVJAG-0000 (REV. 8-61)

DEPARTMENT OF THE NAVY
NAVY DISCHARGE REVIEW BOARD

TO: SECRETARY OF THE NAVY

BUCKET NO. 13837

REVIEW OF THE DISCHARGE OF: KENNEDY, Charles III, (MID) 159421/2105 USNR	CHARACTER OF DISCHARGE RECEIVED U000H
COUNSEL R. A. LEMUS	DATE OF REVIEW 8 Nov 1963
PETITIONER PRESENT ☐ YES ☒ NO	RECORD OF PROCEEDINGS OF REVIEW MADE ☐ YES ☒ NO

FINDINGS

DATE OF ENTRY IN NAVAL SERVICE 6/16/45	AGE 24/10	EDUCATION None: 17-10M 204	GRADE LTJG	REMARKS Average	STATUS ---	GOVT ---
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SUMMARY OF PETITIONER'S CLAIM: Requests: "I desire that the discharge issued to me be withdrawn and that I be issued an honorable discharge." Submit a brief.

SUMMARY OF SERVICE, COMMENDATIONS, AND OFFENSES: Commissioned LTJG(NC) USNR on 6/16/45. Ordered to active duty on 7/10/46. USNR NEWPORT, R.I.; DYO 3RD NAVDIST. PRIOR SERVICE: Apptd ENS USNR 5/12/42 and on 5/8/43 resigned commission to enlist in V-12 program and attended the Rochester School of Medicine until 6/16/45. RECORDS: ADM, NAVJAG.

NOTES THIRD NAVDIST

- 6/8/48 Released to inactive duty.
- 5/9/50 LTJG KENNEDY requested transfer to Inactive Status List.
- 5/19/50 BuPers issued orders transferring LTJG KENNEDY to Inactive Status List to be effective 6/1/50.
- 7/31/51 BuPers transmitted to LTJG KENNEDY via Com3, (1) Narrative statement of facts concerning LTJG KENNEDY, (2) Interrogatories addressed to LTJG KENNEDY, and (3) List of Organizations designated by the Attorney General of the United States, with the request that answers to the interrogatories and/or statement be prepared and forwarded to the ONP. Letter also provided information with regard to submission.
- 8/6/51 COM3 by endorsement directed reply via "this command" within 45 days from this date.
- 9/13/51 LTJG KENNEDY submitted reply to BuPers via COM3. Reply did not comply with requirements of basic letter. Did offer to submit resignation.
- 10/5/51 BuPers requested COM3 to transfer all records to COM4, inasmuch as LTJG KENNEDY was residing in 4th Naval District.

(SEE ATTACHED SHEET)

MEM:VCL

KENNEDY, Charles (nmn), III 159,21/2105 Ex-LTJG(XO) USNR DF 43837

SUMMARY OF SERVICE, RECOMMENDATIONS AND OFFENSES (CONT'D)

REPORTS FOURTH NAVIDIST

- 12/29/51 CCW4 advised BuPers that additional information was being sought and certain undeveloped leads were being pursued.
- 5/23/52 CCW4 offered LTJG KENNEDY the opportunity to appear before a Board of Officers, and advised that should he not desire a hearing that he may submit a resignation based upon a sample (for good of the service). Set 6/9/52 as date of hearing, unless a reasonable request for a postponement was received.
- 5/27/52 LTJG KENNEDY acknowledged ltr of 5/23/52 and requested an additional period of time "to consider in detail with the advice of counsel the matter of a hearing."
- 5/28/52 CCW4 advised LTJG KENNEDY that hearing date had been rescheduled to 6/16/52.
- 6/13/52 LTJG KENNEDY submitted letter of resignation (not UCOFH) and indicated he did not desire a hearing.
- 6/19/52 CCW4 by ltr to BuPers forwarded information in connection with the case including aforementioned ltr of resignation and recommended administrative discharge for the good of the service.
- 7/31/52 SecNav issued letter orders to LTJG KENNEDY via CCW4, discharging him from USNR UCOFH effective 7/31/52.

MEDICAL RECORD: Contains nothing pertinent.

LMB:vcd

D# 43837

REVIEW OF THE DISCHARGE OF: KENNEDY, Charles, II (nmn) Ex-LTJG (MC) CHARACTER OF DISCHARGE RECEIVED
159421/2105 USNR UCOTH
 CONCLUSION

REMARKS

After careful consideration of the facts presented in all available records of the Department of the Navy and of the claims and evidence submitted, the Board finds that the discharge was proper and equitable under standards of law and discipline applicable at the time, or since made applicable, and that the discharge accurately reflects petitioner's conduct and character during the period of service which was terminated by the discharge. Not finding sufficient evidence to support a contrary conclusion, the Board concludes that no change, correction or modification should be made in the type or character of the discharge.

DECISION: NO CHANGE. ~~CORRECTION~~

It is the decision of the Board that the character of the discharge originally issued is proper and that no change, correction, or modification be made in the Under Conditions Other Than Honorable Discharge.

(Auth: Sec. 301, Servicemen's Readjustment Act of 1944, P.L. 346 - 78th Congress)

President	BOARD MEMBERS
<i>[Signature]</i> D. W. ECKMAN, CAPT, USN	MEMBER <i>[Signature]</i> J. V. BRIGGS, LCDR, USN
MEMBER <i>[Signature]</i> C. H. BRYAN, JR., LCDR, USN	MEMBER <i>[Signature]</i> VIRGIL G. BOWEN, MAJ, USMC
-----	RECOMMENDATION TO BE CORRECT LYLE W. EADS, LCDR, USN

~~EXAMINED~~
Forwarded

Reviewed and Approved DEC 5 1963

[Signature]
C. W. TRAVIS, CAPT, USN
Director, Navy Council of Personnel Boards
REVIEW OF DISCHARGE
NAVEXOS-2409 (REV. 6-61)

[Signature]
Secretary of the Navy
PAUL R. FAY
Under Secretary of the Navy

8-50470

DEFENDANT'S EXHIBIT A-COMMUNICATION 19 May 1950
[Filed Dec. 21, 1966]

DEPARTMENT OF THE NAVY
Bureau of Naval Personnel
WASHINGTON 25, D.C.

159421/2105
Pers-B1134/cam
19 May 1950
Ser: N-005384

From: Chief of Naval Personnel
To: LTJG Charles (n) KENNEDY, (MC), USNR, 159421/
2105
175 Clark Street
Kenmore, New York
Via: Commandant, THIRD Naval District
Subj: U.S. Naval Reserve Officer Inactive-Status List;
transfer to.
Ref: (a) Your request of 9 MAY 1950 with fwdg end
(b) Title III, Public Law 810, 80th Congress
(c) "Rules for Eligibility of Naval Reserve Officers
to Earn Retirement Credits" approved by the
Secretary of the Navy on 12 May 1949.

1. As requested by reference (a) and in accordance with the provisions of references (b) and (c), you are hereby transferred to the U.S. Naval Reserve Officer Inactive-Status List effective 1 June 1950.

2. While you are on the subject list you will not be eligible for promotion or for training in the Naval Reserve Program. You will not be considered immediately available but may be called to active duty in the event of any future national emergency. Attention is invited to two of your continuing responsibilities: (1) advising the Commandant of any change of address, and (2) completing and submitting the Annual Qualifications Questionnaire (Form NavPers 319).

3. In the event you are again able to participate actively in the Naval Reserve Program and desire to do so, you are advised to submit a request for reinstatement to eligible status. Such request will receive consideration together with others in the same category and, provided a mobilization vacancy exists, you may then be transferred from the subject list.

J. W. WINTERS
By direction

DEFENDANT'S EXHIBIT A—
 CERTIFICATE OF SATISFACTORY SERVICE
 [Filed Dec. 21, 1966]

President of the United States of America



SA

*Expresses the sincere appreciation of his fellow-
 countrymen for the loyal service rendered by*

LIEUTENANT JESSE EDWARD CHARLES KENNEDY III #159421

MEDICAL CORPS, UNITED STATES NAVAL RESERVE

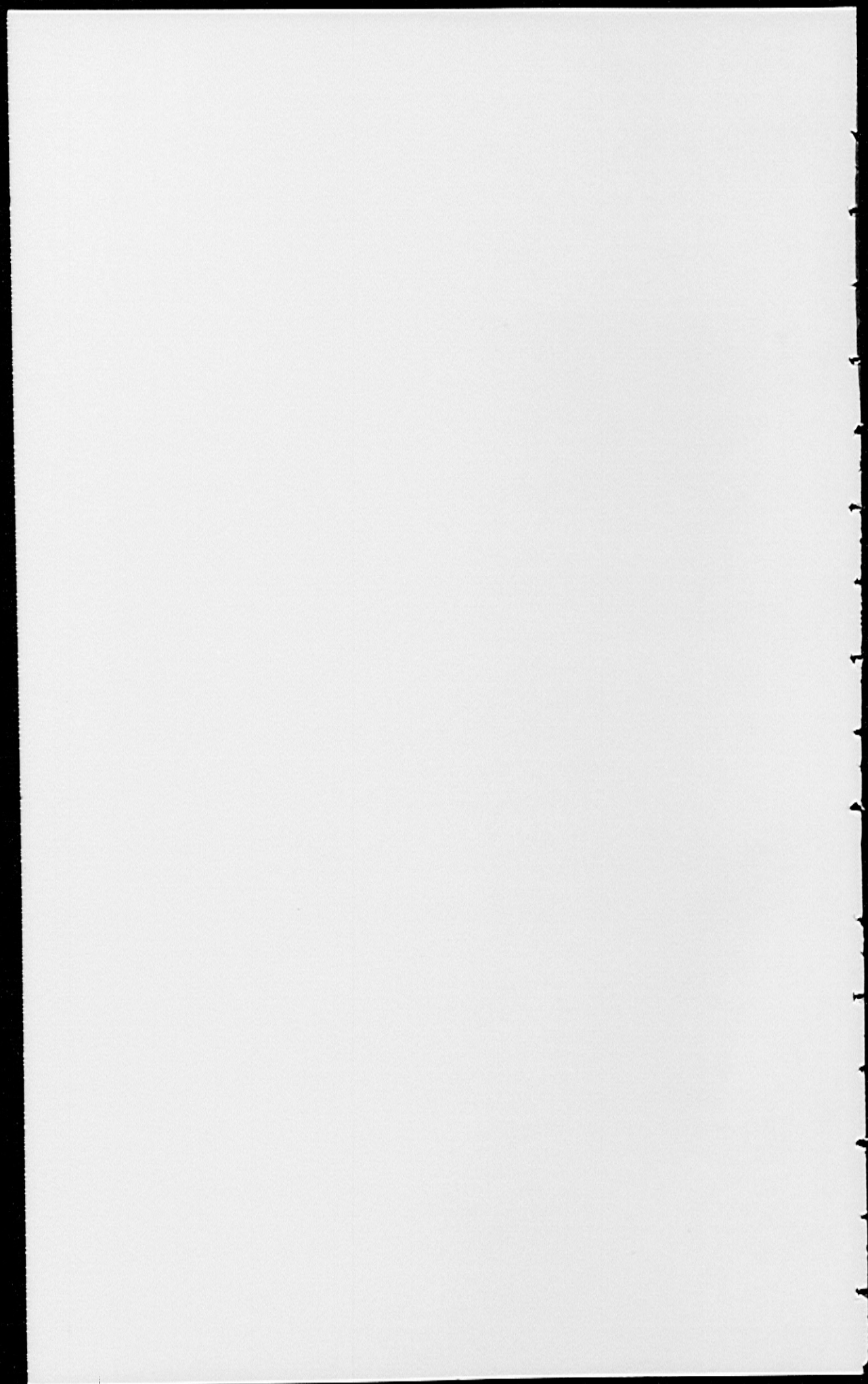
*on active duty in the United States Navy
 during World War II.*

*In testimony whereof I am privileged to bestow
 this*

Certificate of Satisfactory Service

Done in the City of Washington, D.C. this **SEVENTE**
day of **JUNE** *Nineteen hundred and forty* **EIGHT**.

For the President
John F. Sullivan
 Secretary of the Navy



DEFENDANT'S EXHIBIT B

[Filed Dec. 21, 1966]

CIRCULAR LETTER NO. 4-49

**49-27—Procedure With Regard to Naval Personnel and to Applicants
for Enlistment or Appointment Whose Previous Conduct or
Associations Cast Doubt Upon Their Loyalty**
Pers-32, P1-6, 10 January 1949

ACTION: ALL SHIPS AND STATIONS

(Ref.: (a) SecNav ltr. of 10 Jan. 1949; 49-15.)

(Enc.: (A) List of organizations designated as suspect by the Attorney General.)

1. Paragraph 6 of reference (a) authorizes and directs the Chief of Naval Personnel to establish and promulgate to the U. S. Navy and U. S. Naval Reserve detailed procedure for handling of cases wherein investigation has placed in question the loyalty of officers or men of the Navy or Naval Reserve. Accordingly, the following procedure is prescribed, in consonance with the standards provided in the reference.

A. If the Chief of Naval Personnel concurs that the information supplied by the Office of Naval Intelligence establishes, *prima facie*, on the part of any member of the Navy or Naval Reserve, conduct or associations similar to those set forth in paragraph 2 of reference (a), and if the Chief of Naval Personnel determines in the affirmative the issue set forth in paragraph 5 of reference (a), the Chief of Naval Personnel shall forward to each such member the interrogatories and statement relating to him supplied by the Office of Naval Intelligence. The member of the naval service to whom such interrogatories and statements are forwarded shall be informed that he is at liberty to refuse to submit written answers to the interrogatories directed to him. He shall be further informed that he may submit such written statement as he may see fit concerning the assertions made. He shall also be informed that he may consult such counsel

of his own choice as may be available at the time and place for assistance in preparing answers to interrogatories or any statement, and for general advice concerning the allegations against him. If the person to whom such reference is made does not desire to submit either or both answers to interrogatories or any statement, he shall promptly signify such fact by letter addressed to the Chief of Naval Personnel. Otherwise, answers to interrogatories and statement (if any) shall be promptly forwarded to the Chief of Naval Personnel.

B. If upon review of all information in the case, including any answers to interrogatories and statements submitted, the Chief of Naval Personnel determines that the case of any member of the Navy or Naval Reserve is susceptible to full and adequate treatment by trial before a court martial, the Chief of Naval Personnel will forward all relevant data to an appropriate command, recommending such trial. In this event, procedure shall be as otherwise prescribed for trials before courts martial.

C. If the individual or individuals concerned be subject to administrative separation from the naval service, and if trial before a court martial be not feasible nor desirable, the Chief of Naval Personnel will forward all relevant data to such naval command or commands authorized to convene general courts martial as may have jurisdiction over the individual or individuals concerned, with direction to proceed in accordance with this letter. A command authorized to convene general courts martial which receives such direction shall:

- (1) Convene a board of three officers, senior in rank to the individual concerned. There should not be included in the membership of such board any officer who has previously participated in investigation of the particular case, or who has reviewed investigative reports or has previously made recommendations respecting the particular case. To the greatest extent practicable, officers constituting such board should have no prior knowledge of the facts, and should not have been associated intimately with persons

named in the investigative report, nor with persons who have actively participated in the investigation of the facts or reporting the same to the Navy Department.

(2) Designate a recorder for the board, who shall not be a member thereof. The duties of the recorder shall be in all respects similar to those of a judge advocate for a general court martial or of a recorder for a summary court martial. Included in such duties shall be supervision over the preparation and maintenance of a stenographic record of the board proceedings.

(3) A written notice shall be addressed to each such individual suspected of disloyal conduct or associations. The notice shall inform the individual:

(a) That he may submit a resignation (if an officer) or agreement to accept discharge (if enlisted) from the naval service. The notice shall indicate the character of resignation of which acceptance would be recommended or the character of discharge which authority would be requested to execute. The character of separation will depend upon the circumstances of each case; however, it is considered that in the usual situation an officer might be permitted to resign for the good of the service (with ensuing discharge under conditions other than honorable) and an enlisted man might be permitted to accept discharge as undesirable. (Refer to current directives relating to discharges and revocation of commissions of officers and to enlisted discharges.)

(b) That if he desire a hearing before a board of officers, a board has been convened for the purpose, composed of (*names of members of the board*); that he may, by letter addressed to the convening authority, challenge any or all of the members named, setting forth reasons why the member or members challenged are believe biased, prejudiced, or otherwise unable to accord him a fair and impartial hearing; that unless challenges are deemed wholly vexatious, substitute

members will be named for those challenged, with opportunity similarly to challenge such substitute members.

(c) That if he desire a hearing, he shall address a letter to the convening authority indicating that fact, and setting forth the general outlines of his contemplated defense. The notice shall advise the individual that failure adequately to set forth the nature of his proposed defense, resulting in surprise to the recorder, may necessitate adjournment of the hearing with consequent inconvenience to himself, any witnesses, and counsel in having to appear at the adjourned date. He shall be further advised that his statement in this regard will be furnished the recorder as an aid to preparation of the prosecution.

(d) That hearing will be held at (*place and time*) on (*date*) unless he desire to submit resignation or agreement to accept discharge, or unless he indicate that he does not desire a hearing; that requests for reasonable postponements of the hearing to permit obtaining evidence and preparation of his case will be honored in the discretion of the convening authority; and that, if he desire a hearing, he shall appear at the hearing in person and may also be represented by counsel of his own choice. (It is considered that date for hearing should normally be set at least 15 days in advance of the date upon which the notice will reach the person concerned in due course of post or delivery, but a longer or shorter period may be set by the convening authority, depending upon the circumstances.)

(e) That any hearing held in his case will not be, in any sense of the word, a trial or an adjudication, but will be solely for the purpose of obtaining an opinion from officers believed to be impartial as to whether there is or is not reasonable ground to doubt his loyalty.

(f) That no process exists to compel the attendance of witnesses in his behalf before the board, but that ex parte statements and letters, sworn and unsworn, may be freely exhibited to the board and made a part of the record in his case, and any witnesses appearing voluntarily may be examined and cross-examined on all matter germane to the hearing.

(g) That no provision is made by law for the payment of, or reimbursement for, any expenses incurred by him or by any witnesses in connection with such hearing; and (if not on active duty) that attendance at such hearing will not place him in an active-duty status nor entitle him to active-duty pay or allowances.

(4) If the officer or man concerned submit a resignation or agreement to accept discharge; or if the officer or man concerned indicate in writing that he does not desire a hearing; or if the officer or man concerned fail, without reasonable excuse, to appear in person at the time and place set for hearing; then, at the discretion of the convening authority, no further proceedings need be held, and all papers in the case may be returned to the Chief of Naval Personnel, with indication as to extent of action taken.

(5) If hearing be held, such hearing shall be commenced by a statement of the recorder, setting forth the salient facts contained in the investigative statement, and submitting any comment thereon. The individual or individuals reported upon shall then be asked if it is desired to make a preliminary statement relative to denial of the allegations made, evidence controverting the same which will be introduced, or admission of the facts stated though controverting inferences drawn therefrom. The recorder may then introduce any matter he may have in addition to the investigative statement, following which the individual or individuals reported upon may introduce matter in his or their own behalf. The presiding member of the board shall administer an oath to speak the truth to

any persons testifying in person before the board, and all persons so testifying shall be subject to examination and cross-examination by each individual being heard, the recorder, and the board as to matters covered in the examination of the individual offering the testimony and as to matters not so covered, so long as they be germane to the general purpose of the proceeding. Upon presentation of all evidence, the recorder and any or all individuals being heard may sum up (if desired), any such summing up to be closed by the recorder. Thereafter the board shall deliberate out of the hearing of the recorder, individuals heard, and counsel, although the board may recall any person for further examination, if desired. The board shall then indicate to the convening authority whether or not, in the opinion of a majority of the members of the board, there is substantial reason to doubt the loyalty of each of the individuals heard. If the opinion of the majority of the members be that there is ground to doubt the loyalty of a particular individual or individuals, then as to each such individual, the board shall indicate that the factors set forth in subparagraphs (d) and (e) of paragraph 6 of reference (a) have been noted, and have been weighed and considered by the board to the extent to which they apply to the situation involved in the particular case. Each of the individuals heard shall be entitled to a copy of the record of proceedings.

Should it appear to the board at any time during the course of hearing that either the recorder or any individual being heard has been unduly surprised by matter not previously set forth, then adjournment of the hearing may be granted in the discretion of the board to permit further preparation of prosecution or defense respecting such matter.

(6) The convening authority shall review the record, and note thereupon his concurrence or nonconcurrence in the board opinion, together with comment and recommendations deemed apposite. If the convening authority

concur in a board opinion that there is ground to doubt the loyalty of a particular individual, he shall note his cognizance and consideration of subparagraphs (d) and (e) of paragraph 6, reference (a). The record shall thereupon be forwarded to the Chief of Naval Personnel.

D. The record of local board proceedings shall be reviewed in the Bureau of Naval Personnel by a board appointed by the Chief of Naval Personnel, pursuant to the authority conferred by reference (a). Such board may recommend with respect to each individual whose case is reviewed:

(1) That after consideration of the factors set forth in subparagraphs (d) and (e), paragraph 6, reference (a), it is considered that he should be separated from the naval service, in which event the record shall be referred to the Chief of Naval Personnel for appropriate implementing action or recommendation;

(2) That no further action be taken, in which event the record shall be referred to the Chief of Naval Personnel for approval. If the Chief of Naval Personnel approve the recommendation, the record shall be transmitted to the Office of Naval Intelligence to be filed, and no reference to the matter shall be contained in personnel records relating to the individual; or

(3) That further investigation be made relative to certain specific issues, and the case returned to it. In this event, the review board shall forward the record to the Office of Naval Intelligence, requesting further investigation along specific lines, and action shall be withheld pending return of the record to the Bureau of Naval Personnel review board and recommendation as in (1) or (2) above.

2. Paragraph 7 of reference (a) authorizes and directs the Chief of Naval Personnel to promulgate procedures for the examination of applicants for enlistment or appointment in the Navy and Naval Reserve relative to previous conduct or associations of the character set forth in paragraph 2 of

reference (a). The reference further authorizes and directs the Chief of Naval Personnel to promulgate procedures for disciplinary or other action to be taken in case of misrepresentation, concealment, or failure fully to divulge, conduct or associations of the character indicated prior to application for enlistment or appointment. Accordingly, it is directed that each applicant for enlistment, appointment, reenlistment, or reappointment in or to the Navy or Naval Reserve shall be given:

(a) A list of any organizations, associations, movements, groups, or combinations of persons which may have been specifically and publicly designated by the Attorney General or by armed-forces Secretaries as being totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means. The applicant shall be requested to initial this list to indicate his cognizance thereof. Enclosure (A) constitutes the list of organizations currently designated. All commands charged with administratively effecting appointments, enlistments, reappointments, or reenlistments will duplicate this list in numbers sufficient to meet immediate future needs. Such commands are further directed to establish liaison with local intelligence offices or officers, and to keep lists in use current through additions and deletions as announced by the Attorney General or other competent authority.

(b) A certificate in the form set forth below, upon which shall also be copied the standards set forth in paragraph 2 of reference (a). All commands charged with administratively effecting appointments, enlistments, or reenlistments will duplicate the standards set forth in paragraph 2 of reference (a), together with the certificate set forth in the text following, in numbers sufficient to meet anticipated needs at least over the ensuing 6-month

period. Whether standardized forms will be later centrally printed and distributed has not been determined, and changes in the form may be hereafter announced.

The applicant shall be required to read both the list and the standards; shall be asked specifically if he or she fully understands them; and to the extent that lack of understanding may be evidenced, the list and standards shall be explained to the applicant. Thereafter, the applicant shall execute the certificate, which shall be in the following tenor:

"I have read the attached list of organizations, associations, movements, groups, and combinations of persons, and of those listed I am or have been a member of; am or have been employed by; have attended or been present at formal or informal meetings or gatherings of; have attended, been present at, or engaged in, organizational or social activities of or sponsored by; have sold, given away, or distributed written, printed, or otherwise recorded matter published by; or have in any other manner been identified or associated with; the following:

(For each name stated, set forth a detailed account of nature and extent of association with and activities in connection with the organization, association, movement, group, or combination indicated, including dates, precise description of credentials now or formerly held, and, to the greatest extent recollected, names and addresses of others similarly associated or acting. Attach as many extra sheets as necessary for this purpose. If Federal constitutional privilege is claimed as respects the association in question or as to all or any part of activities in connection with any of the names set forth, the applicant may state either, "Federal constitutional privilege is claimed," or "Federal constitutional privilege is claimed as to—" (describing the specific portions of association or activities as to which the claim is made).)

"I have further read or had explained to me, and fully understand the matter copied above, constituting a description of present or past conduct or association deemed by the Secretary of the Navy to constitute sufficient grounds for rejecting applicants for membership in the naval service. I have engaged in conduct or associations of or similar to the nature of those set forth only to the following extent:

(Attach additional sheets as necessary to a full detailed statement. If Federal constitutional privilege is claimed, state such claim, as described above.)

"I understand that false representation concerning, or failure fully to disclose (in the absence of an express claim of privilege), any detail of association with, or activities in connection with, any of the organizations, associations, movements, groups, or combinations listed on the attached sheet which I have initialed, or any detail of present or past conduct or associations of or similar to the character of those copied above, shall constitute grounds for bringing me to trial before a general court martial with possible consequent conviction and imprisonment, or for subsequently separating me from the naval service under conditions other than honorable with or without any precedent court-martial procedure. I further understand that even though I am not accepted for enlistment or appointment in the naval service, I may be subject to civil prosecution for false certification in any of the foregoing respects. Fully appreciating the foregoing, I hereby certify that the statements above constitute a correct and full disclosure (to the extent that privilege has not been expressly claimed) of all my present and past connections of any nature with any one or more of the groups named on the attached list, and of any and all conduct or associations of or similar to the character of those set forth in paragraph 2 of reference (a), copied above, in which I am now engaging or have at any time engaged.

"Given under my hand this — day —, 19—.

“_____”

If the foregoing certificate contains any entries other than "none" or "none to my knowledge," it shall be promptly forwarded to the Chief of Naval Personnel for authorization to effect enlistment or appointment. In this event, forwarding commands and officers shall make recommendations respecting enlistment or appointment, supported by any observations and comment deemed relevant. Otherwise, the certificate, with initialed list of organizations attached, shall be included with other documents relating to the application, and similarly forwarded, filed, or otherwise disposed of. Such certificates and lists of organizations signed and initialed by persons then or subsequently accepted for membership in the Navy or Naval Reserve shall be forwarded to the Chief of Naval Personnel to be permanently filed in the official records of those persons.

3. Upon indication that any person who has unsuccessfully sought admission to the naval service has misrepresented, concealed, or failed fully to divulge previous conduct or associations of the character set forth in paragraph 2 of reference (a), the command having cognizance thereof may present the facts to appropriate law-enforcement officers of any jurisdiction whose laws have been thereby infringed. Upon discovery of such fraudulent certification subsequent to enlistment or appointment, the Chief of Naval Personnel may, in his discretion, direct either such summary and drastic procedures as may otherwise be provided by law, or procedures as set forth in paragraph 1 above, as the surrounding circumstances may require.—*BuPers. T. L. Sprague.*

DEFENDANT'S EXHIBIT C

[Filed Dec. 21, 1966]

NAVY DEPARTMENT
Washington, D. C.

Excerpt from
BUREAU OF NAVAL PERSONNEL MANUAL
True copy of Article C-10334

C-10334. TYPES OF OFFICER DISCHARGES (Change No. 4)

(1) Prior to 1 February 1948 officers of the naval service were not "discharged" in the sense of being awarded formal certificates such as are given enlisted personnel upon separation. Rather, the discharge was of an intangible character, sometimes expressed in orders effecting separation, sometimes a matter of necessary implication from the fact of separation. The type of officer discharges which have been approved for all of the armed services and the detailed policies and procedures therefor are discussed herein. Officers who have been totally separated from the naval service (as distinguished from those merely released from an active duty status) subsequent to 31 January 1948, with certain infrequent exceptions, will be entitled to one of the following types of discharge certificates:

(a) *Honorable discharge.*—Generally speaking, an honorable discharge certificate will be granted to officers under circumstances which would warrant such a discharge in the case of an enlisted member of the naval service. The following standards will govern the issuance of honorable discharge certificates:

1. Acceptance of unqualified resignations, as described in article C-10336 (1).
2. Discharge of reserve officers on inactive duty for age in grade, as a result of failure to pass physical exam-

ination, or for reasons which, by administrative determination, entitle them to honorable discharges.

3. Discharge by reason of no future need for the services that an officer is qualified to perform.

4. Discharge because of failure to pass professional examination for promotion or failure of selection for promotion.

5. Administrative separation for cause in cases wherein the cause for separation is not deemed to be of such a nature as to preclude honorable discharge, for example:

a. Academic failures despite honest effort.

b. Personality defects or physical deficiencies despite which the individual concerned is believed to have performed service to the best of his ability.

c. Other conditions generally resulting in an honorable discharge for enlisted personnel.

(b) *General discharge.*—A general discharge certificate will be granted to officers administratively separated for causes wherein the cause for separation or the previous record of the officer concerned is of such a nature as to preclude honorable discharge but is not of such a nature as to require discharge under conditions other than honorable, for example:

1. Acceptance of resignations submitted in the form described in article C-10336 (2).

2. Academic failures due at least in part to lack of effort.

3. Personality defects or physical deficiencies unaccompanied by a record of performance deemed to represent the best of which the individual is capable.

4. Separation of Reserve officers for failure to answer official correspondence, willful absence from drills, and like causes.

5. Separation for any cause wherein review of the record of service of the individual concerned indicates performance of duty of a consistently below average or unsatisfactory character.

(c) *Discharge (under conditions other than honorable).*—A certificate entitled "Discharge (under conditions other than honorable)" generally will be awarded officers separated otherwise than by dismissal pursuant to sentence of a general court-martial, wherever the circumstances prompting separation are not deemed consonant with traditional naval concepts of "honor." Examples of situations in which this type of discharge will be awarded are:

1. Acceptance of a resignation to escape dismissal. Such resignations are typified for the good of the service and are submitted in the form described in article C-10336(3)

2. Acceptance of a resignation for the good of the service and to escape trial by general court-martial. This type of resignation must be submitted in the form described in article C-10336 (4).

3. Acceptance of a resignation for the good of the service. This type of resignation must be submitted in the form described in article C-10336 (3).

4. Separations of officers by reason of record of conviction by civil authority upon criminal charges. (Note exception in article C-10337 for officers dropped from the rolls to whom no certificate of discharge is awarded.)

5. Separations for homosexuality, drug addiction, habitual drunkenness, and chronic default in the fulfillment of legal obligations.

6. Separations for other reasons which would result in the award of an undesirable or bad-conduct discharge were the individual concerned an enlisted man.

(d) *Dismissal pursuant to sentence of general court martial.*—Officers separated from the service in this manner will not be awarded a certificate of discharge of any of the characters set forth above. Their only separation document will be a letter signed by the Secretary of the Navy, or by an authority to whom he has lawfully delegated the function, informing the officer concerned of his trial, conviction, and sentence, Departmental action upon and approval of the sentence, and fact of dismissal. This is the lowest type of

separation from the naval service. Prior to the year 1948, such a separation of an officer was characterized by the Navy Department as being "under conditions other than honorable." It is now officially stated as being "in all respects equivalent to a dishonorable discharge."

(2) In all cases in which administrative separation of an officer from the service is being recommended, the authority so recommending shall further make recommendation as to the type of discharge which should be awarded in accordance with the foregoing paragraphs.

(3) Ultimate determination as to the name and character of total separation of any officer shall be made in the Navy Department. In this connection it is to be emphasized: (a) That the foregoing certificates of discharge will be issued from the Navy Department alone; under no circumstances will any ship or station ever issue any form of certificate of discharge to an individual separated from the service as a warrant or commissioned officer; (b) That the foregoing certificate will be issued only following total separation from the service—not release to inactive duty.

DEFENDANT'S EXHIBIT E

(Filed Dec. 21, 1966)

VETERANS ADMINISTRATION

Department of Veterans Benefits

WASHINGTON, D.C. 20420

December 19, 1966

YOUR FILE REFERENCE:

Mr. J. Walter Yeagley
Assistant Attorney General
Internal Security Division
United States Department
of Justice

Washington, D. C. 20530

Attention: Mr. Garvin L. Oliver

IN REPLY REFER TO: 213A
C 14 800 849
KENNEDY, Charles

Re: Charles Kennedy v. Secretary of Navy
(D.D.C.) Civil Action No. 2960-65

Dear Mr. Yeagley:

This is in response to your letter of November 30, 1966 concerning the benefits status of Dr. Charles Kennedy.

The Department of the Navy advises that he entered in the inactive reserve on May 21, 1942 as an officer (Ensign, Hospital Voluntary Probationary) and resigned May 7, 1943 under honorable conditions. He reenlisted in the inactive reserve on May 8, 1943 as an Apprentice Seaman, remaining in that status until June 30, 1943. On July 1, 1943 he reported for active duty at the Naval Training Unit, University of Rochester School of Medicine, Rochester, New York, serving honorably in this capacity until June 15, 1945, during which time he pursued a course in medicine in the Naval College Training Program, completing 8 terms of an 8 term course. His separation on June 15, 1945 was to accept a commission as a Lieutenant (J.G.), Medical Corps, U. S. Naval Reserve. He served in the inactive reserve from June 16, 1945 to July 9, 1946.

On July 10, 1946 he reported for active duty from which he was released honorably on June 8, 1948. He returned to the inactive reserve on June 9, 1948 and received an other than honorable discharge on July 31, 1952 while a member of the inactive reserve for acts committed while a member of the inactive reserve.

To have entitlement to the gratuitous Veterans' Benefits administered by the Veterans Administration (as distinguished from insurance which arises out of a contractual obligation) requires that the claimant have the status of "veteran". 38 USC 101(2) provides:

"The term 'veteran' means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable."

The term "active military, naval, or air service" is defined in 38 USC 101(24) as including:

“* * * active duty, any period of active duty for training during which the individual concerned was disabled or died from a disease or injury incurred or aggravated in line of duty, and any period of inactive duty training during which the individual concerned was disabled or died from an injury incurred or aggravated in line of duty.”

Dr. Kennedy's active service from July 10, 1946 to June 8, 1948 meets the requirements of the definition of "veteran". It was the basis for payment of Educational Benefits at the rate of \$120 per month, totaling \$2880 during his Residency Training at Children's Hospital, Buffalo, New York, from January 1, 1949 to February 28, 1951. As Title 38 United States Code contains no provision which would nullify his veteran's status because of the character of his discharge from a subsequent period of inactive duty he may qualify for other Veterans' Benefits providing he meets the other requirements of such programs.

On the other hand, his period of inactive duty cannot give entitlement to gratuitous benefits as it is not shown to have been "active military, naval, or air service." We are unaware of, and Dr. Kennedy has not asserted, any period of inactive duty training performed by him, or any disabling injury incurred or aggravated in line of duty during such a period as would be necessary under 38 USC 101(24) to bring such a period within "active military, naval, or air service."

Furthermore, were the facts to show that this period was, in fact, "active military, naval, or air service", the Department of Navy determination that this service was "under conditions other than honorable" would not necessarily serve to bar him from gratuitous benefits based on this period of service. Being neither expressly honorable nor dishonorable, it would be necessary for the Veterans Administration to determine on the facts whether Dr. Kennedy's service was "under conditions other than dishonorable" as contemplated by 38 USC 101(2). Dr. Kennedy has not raised this issue with the Veterans Administration.

Accordingly, Dr. Kennedy's discharge from inactive reserve status has not served to deprive him of any benefit under laws administered by the Veterans Administration.

Sincerely,

/s/ A. W. Stratton
A. W. STRATTON
Chief Benefits Director

DEFENDANT'S EXHIBIT F

[Filed Dec. 21, 1966]

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF VETERANS' AFFAIRS
270 BROADWAY
NEW YORK 7, N. Y.

December 6, 1966

Mr. Lee Oliver
United States Department of Justice
Washington, D. C. 20530

Re: Charles Kennedy v. Secretary
of the Navy (D.D.C.) Civil
Action No. 2960-65

Dear Mr. Oliver:

This will confirm our telephone conversation of December 6, 1966 regarding the payment of a New York State World War II bonus to Mr. Charles Kennedy. I am taking the liberty of enclosing a certification of payment to Mr. Kennedy.

I have researched the other benefits that Mr. Kennedy might be entitled to as a veteran under New York State law and I find nothing that he would be precluded from because of his release under conditions other than honorable from the inactive naval reserve. His separation from active naval

service under honorable conditions would entitle him to receive certain New York State benefits such as a veteran's blind annuity and real property tax exemption if he purchased property in this state.

If we can be of further assistance, please feel free to contact us.

Sincerely yours,

/s/ James L. Casey
JAMES L. CASEY
Counsel

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF VETERANS' AFFAIRS
VETERANS BONUS BUREAU

155 Washington Avenue
Albany 10, N.Y.

Mr. Francis X. Worthington
Chief, Civil Section
Department of Justice
Washington, D. C. 20530

Re: Charles Kennedy, II
SN 7 327 156
159 421

DEC 2 1966

To whom it may concern:

This is to certify that the above named veteran of World War II has received a New York State Veterans' Bonus of \$150. Ch#447545 issued 7/48.

Very truly yours,
Director, Division of Veterans'
Affairs

VB 503.

By Thomas J. Manning

DEFENDANT'S EXHIBIT G

[Filed Dec. 21, 1966]

**COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF MILITARY AFFAIRS**

19 S. Second Street, P.O. Box 415
Harrisburg, Pennsylvania 17108

2 December 1966

RE: KENNEDY, Charles

Mr. Francis X. Worthington
Chief, Civil Section
United States Department of Justice
Washington, D. C. 20530

Dear Mr. Worthington:

This will acknowledge receipt of your letter of 30 November 1966 relative the above captioned former member of the Naval Forces of the United States of America.

Replying in full to your request may we preface our remarks by saying Charles Kennedy, USNR, 159421, was not paid any funds from the Commonwealth of Pennsylvania for his service.

Secondly, since he was in the inactive reserve from 12 May 1942 to 8 May 1943, he would not be entitled to any benefits.

Thirdly, from 8 May 1943 to 15 June 1945 he was undergoing medical training and was not a member of the armed forces and, therefore, would not be eligible for payment of any benefits.

He was then commissioned on 16 June 1945 in the Navy inactive reserve and he did not enter active duty until 10 July 1946 and served until 8 June 1948. (In order to be eligible for such bonus he would have to have served at least sixty days between 7 December 1941 and 2 September 1945, and there is no support of such service being had.

He was inactive from 8 June 1948 to July of 1953 and was discharged from inactive status under other than honorable conditions, and this too would preclude him from receiving any benefits from the Commonwealth of Pennsylvania.

I trust this is the desired information.

Very truly yours,

/s/ Daniel W. Shaub
DANIEL W. SHAUB
Deputy Adjutant General
Veterans Affairs

DWS/mh

ORDER

[Filed Feb. 23, 1967]

The above-entitled cause having come before the Court on plaintiff's motion for judgment on the pleadings or in the alternative for summary judgment and on defendant's motion to stay the case pending plaintiff's exhaustion of his administrative remedy before the Board for Correction of Naval Records or in the alternative to dismiss or for summary judgment, and the Court having limited its consideration of the matter to defendant's aforesaid motion to stay and all pleadings filed herein relating thereto, and having heard oral argument of counsel for each side thereon, and the Court having concluded that this cause should be stayed pending plaintiff's pursuit of administrative relief through the Board for Correction of Naval Records pursuant to Title 10, United States Code, Section 1552, and Title 32, Code of Federal Regulations, Section 723, *et seq.*, it is therefore by Court this 23rd day of February, 1967,

ORDERED, that further proceedings in this cause be, and the same hereby are, stayed pending plaintiff's application for relief to the Board for Correction of Naval Records, a determination thereon by said Board, and any action which may then be deemed necessary by the defendant pursuant

to such determination; provided that plaintiff is not precluded hereby from applying to the Court for appropriate relief in the event that he deems that the determination by the Board is unreasonably delayed; and it is

FURTHER ORDERED, that the Court retain jurisdiction over the cause, which is hereby removed from the operation and effect of Local Rule 13 until February 1, 1968 or until further order of the Court.

/s/ Alexander Holtzoff
United States District Judge

STIPULATION

[Filed August 22, 1967]

The parties hereto, by their attorneys, stipulate and agree as follows:

1. On February 24, 1967, the plaintiff submitted to the Board for Correction of Naval Records a duly executed application to correct plaintiff's naval record by changing his discharge under conditions other than honorable to an honorable discharge.

2. The Board for Correction of Naval Records denied plaintiff's application and notified him of the denial on June 20, 1967. Attached hereto, marked Exhibit A, is a copy of said notification.

Dated July 20, 1967.

/s/ Joseph Forer
Attorney for Plaintiff

/s/ Garvin L. Oliver
Attorney for Defendant

EXHIBIT A TO STIPULATION

DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDSOMF:rso
20 June 1967

Dr. Charles Kennedy, II
728 South Smedley Street
Philadelphia, Pennsylvania 19146

Dear Dr. Kennedy:

This is in reference to your application, DD 149, dated 21 February 1967, by which you request that your discharge of 31 July 1952, under conditions other than honorable, be changed to an honorable discharge.

The law under which the Board operates, 10 U.S.C. 1552, provides in pertinent part, that no correction may be made unless the claimant or his heir or legal representative file a request therefore before 26 October 1961, or within three years after he discovers the error or injustice, whichever is later. However, the Board may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

The Board has now reviewed your application and your naval record. It has determined that you did not file your application within three years after you discovered the alleged error or injustice and that insufficient evidence has been presented to warrant a finding that it would be in the interest of justice to excuse the failure to file within the prescribed three years. Accordingly, your application has been denied. You are privileged to submit new and material evidence for consideration.

Sincerely yours,

/s/ Charles E. Curley
Executive Secretary

Copy to:
Joseph Forer, Esquire

**PLAINTIFF'S RENEWED MOTION
FOR SUMMARY JUDGMENT**

[Filed August 23, 1967]

The plaintiff, by his attorneys, moves for summary judgment, for the reasons that there is no genuine issue as to any material fact, plaintiff has exhausted all administrative remedies, including any possible remedy before the Board for Correction of Naval Records, and plaintiff is entitled to judgment as a matter of law.

/s/ Joseph Forer

/s/ Robert Z. Lewis
Attorneys for Plaintiff

**DEFENDANT'S MOTION TO DISMISS
OR IN THE ALTERNATIVE FOR
SUMMARY JUDGMENT**

[Filed Sept. 5, 1967]

Comes now the defendant, the Secretary of the Navy, by his attorney, and respectfully moves this Honorable Court to dismiss the complaint for lack of jurisdiction over the subject matter or in the alternative for summary judgment pursuant to the provisions of Rule 56, F.R. Civ. P., on the ground that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law.

In support of this motion the Court's attention is respectfully invited to the defendant's memorandum of points and authorities in support of defendant's motion to dismiss or in the alternative for summary judgment and in opposition to plaintiff's renewed motion for summary judgment and

to the Government Exhibits previously filed with the Court on December 21, 1966. A separate statement of material facts is also attached.

/s/ Garvin L. Oliver
Attorney, Department of Justice,
Washington, D. C. 20530
Attorney for the Defendant

ORDER

[Filed Jan. 29, 1968]

The above-entitled cause having come before the Court on cross-motions of the parties for summary judgment, and the Court having considered all pleadings, exhibits, and papers filed herein and having heard oral argument of counsel for each side, and the Court having concluded that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law and that the constitutional issues need not be decided by the Court, it is therefore by the Court this 29th day of January, 1968,

ORDERED, ADJUDGED, and DECREED that the plaintiff's motion for summary judgment be, and the same hereby is, denied; and it is

FURTHER ORDERED, ADJUDGED, and DECREED that the defendant's motion for summary judgment be, and the same hereby is, granted; and that the action be, and the same hereby is dismissed.

/s/ John J. Sirica
United States District Judge

NOTICE OF APPEAL
[Filed Feb. 5, 1968]

Notice is hereby given this 5th day of February, 1968, that the plaintiff, Charles Kennedy, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the judgment of this Court entered on the 29th day of January, 1968, in favor of defendant, Secretary of the Navy, against said plaintiff.

/s/ Joseph Forer
Attorney for Plaintiff
* * *

Serve:

1. Garvin L. Oliver
* * *
 2. U. S. Attorney
-



BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,742

CHARLES KENNEDY,
Appellant,

v.

SECRETARY OF THE NAVY,
Appellee.

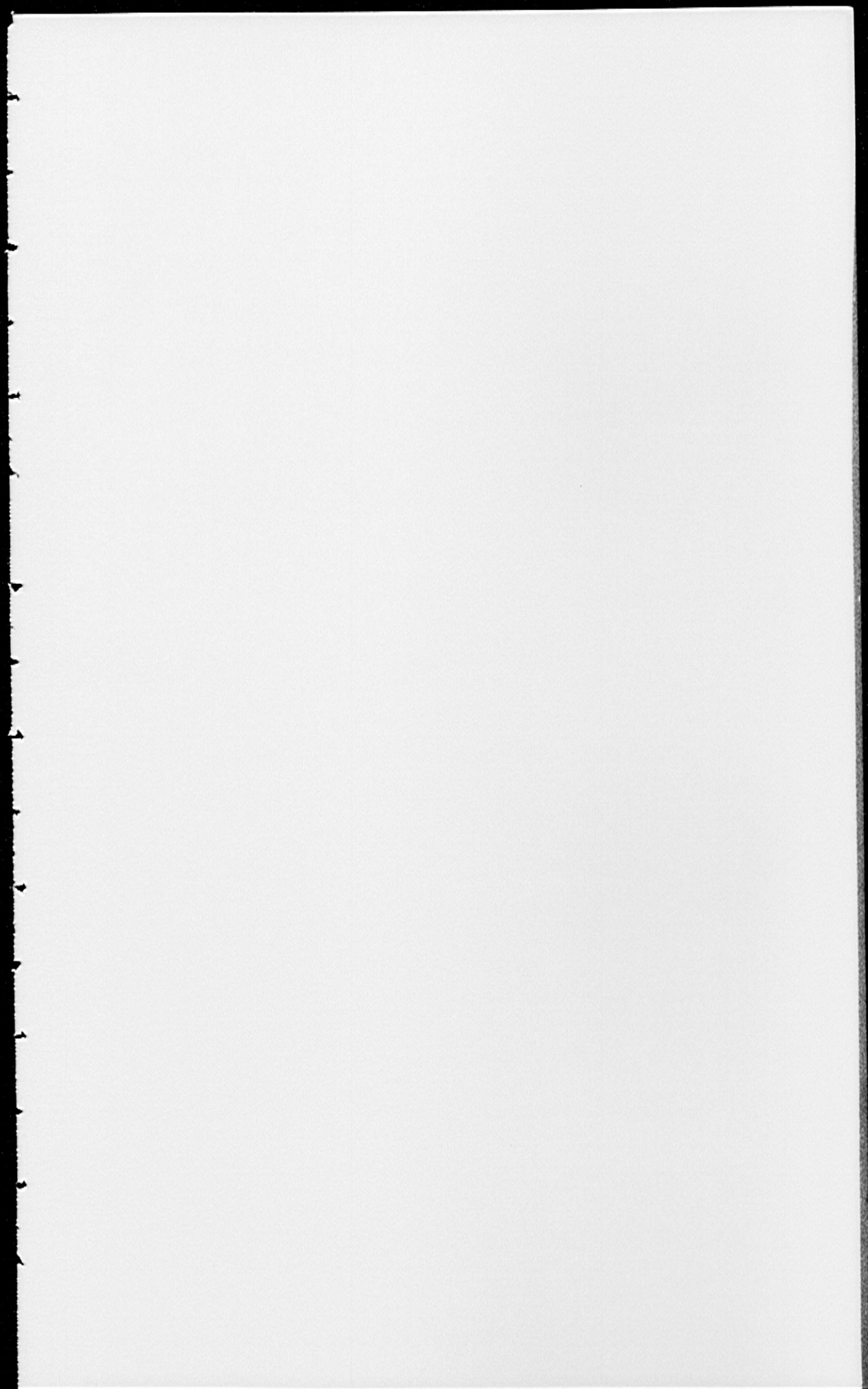
*APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA*

United States Court of Appeals
for the District of Columbia Circuit
Joseph Forer
211 14th Street, N. W.
Washington, D. C. 20005

FILED APR 8 1968

Robert Z. Lewis
11 E. 51st Street
New York, N. Y. 10022

Nathan J. Paulson
CLERK Attorneys for Appellant



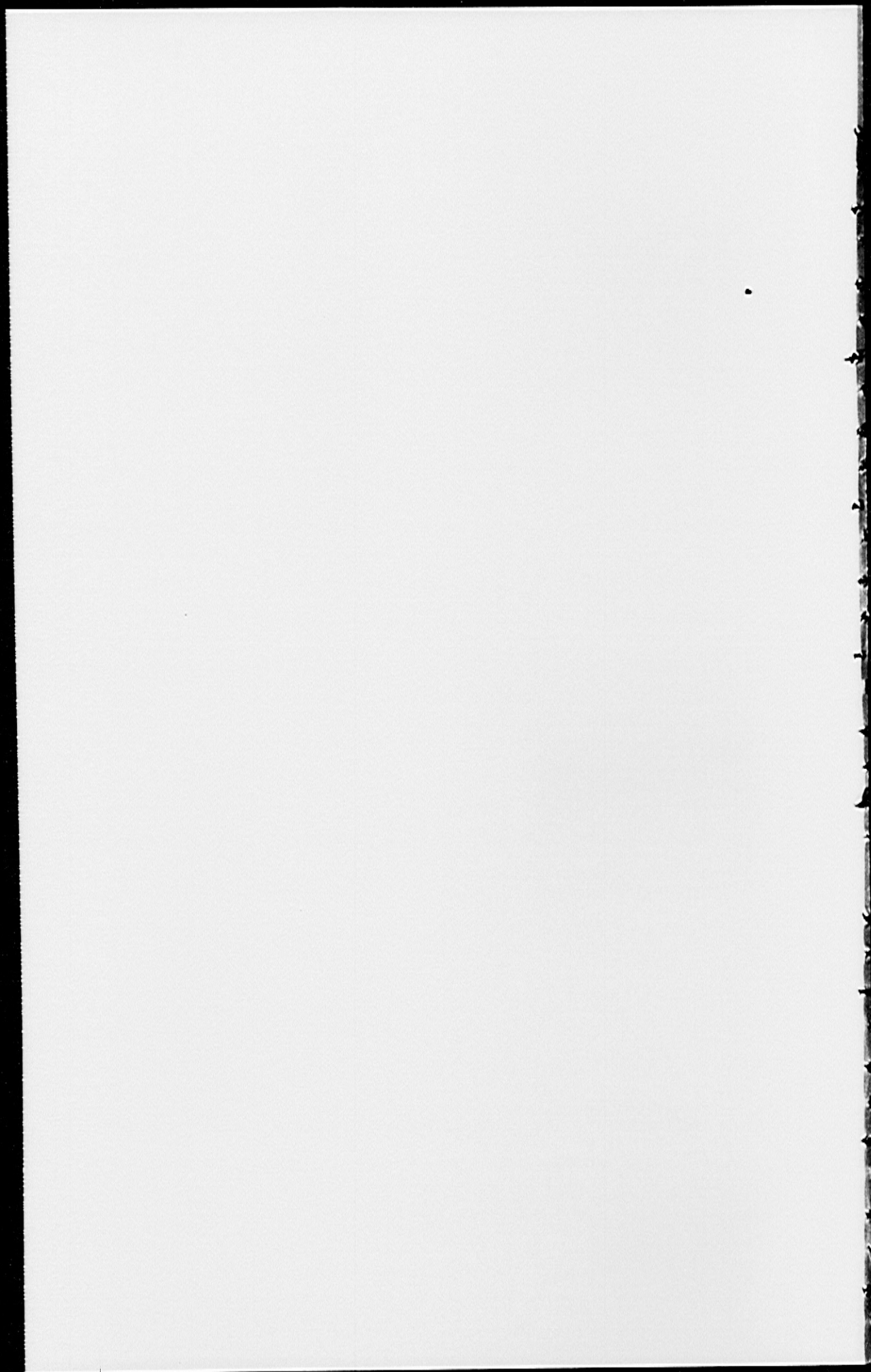
(i)

QUESTIONS PRESENTED

1. Whether the Secretary of the Navy exceeded his statutory authority by issuing a discharge "under conditions other than honorable" to an officer in the inactive Naval Reserve on grounds of membership in and association with the Communist Party, when such membership and association had not affected the character of the officer's military service.

2. Whether the derogatory discharge was invalid because the Secretary had not offered the officer a genuine hearing with the right of confrontation and the officer had not waived such a hearing.

3. Whether the derogatory discharge violated the First Amendment and due process because it was based on political association without regard to the officer's knowledge, intent, and the nature and extent of his activity.



(iii)

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*Authorities chiefly relied on are indicated by an asterisk.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,742

CHARLES KENNEDY,
Appellant,

v.

SECRETARY OF THE NAVY,
Appellee.

*APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from an order of the United States District Court for the District of Columbia entered on January 29, 1968, granting the motion of appellee (defendant below) for summary judgment, denying appellant's motion for summary judgment, and dismissing the action (J.A. 59). The notice of appeal was filed on February 5, 1968 (J.A. 60). The District Court had jurisdiction under D.C. Code § 11-

521, and also under § 10 of the Administrative Procedure Act, formerly 5 U.S. Code § 1009, now 5 U.S. Code §§ 702-706, and 28 U.S. Code § 2201. This Court has jurisdiction under 28 U.S. Code §§ 1291 and 1294.

STATEMENT OF THE CASE

Appellant sued below for a declaratory judgment and injunction to require appellee, the Secretary of the Navy, to change the character of his discharge from the United States Naval Reserve from "under conditions other than honorable"¹ to "honorable" (J.A. 1-4). On cross-motions for summary judgment (J.A. 58), the District Court granted summary judgment in favor of the Secretary (J.A. 59).

The facts are not in dispute and are derived from documents. The parties conceded below the authenticity of copies of these documents, filed as exhibits to the pleadings or independently.

On June 16, 1945, appellant was commissioned a Lieutenant (junior grade) in the United States Naval Reserve. He served on active duty from July 10, 1946 to June 8, 1948, at which time he was honorably released from active duty, awarded a Certificate of Satisfactory Service (J.A. 34), and transferred to inactive duty in the Naval Reserve. Effective June 1, 1950, appellant was transferred to the Naval Reserve Officer Inactive Status List. (J.A. 1, 4, 29, 34.) His status thereafter was described as follows in a letter to him from the Chief of Naval Personnel (J.A. 32):

"While you are on the subject list you will not be eligible for promotion or for training in the Naval Reserve Program. You will not be considered immediately available but may be called to active duty in the event of any future national emergency. Attention is invited to two of your continuing responsi-

¹Under the Naval Regulations, such a discharge is the most unfavorable type of discharge which can be accorded an officer without a court-martial (J.A. 46-49).

bilities: (1) advising the Commandant of any change of address, and (2) completing and submitting the Annual Qualifications Questionnaire (Form VanPers 319)."

On July 31, 1951, the Chief of Naval Personnel wrote appellant that it had been determined that there existed evidence that he had engaged in conduct or associations casting doubt upon his loyalty (J.A. 11-14). The letter enclosed a "narrative statement of facts disclosed by investigation." This statement alleged that appellant had been a member of the Communist Party since 1946; that he had attended meetings of the Communist Party since 1946; that in 1948 he had made financial contributions to the Communist Party; that during 1949 he had attended Communist Party social functions; that since 1947 he had been active in the affairs of the Progressive Citizens of America; and that during 1946 he had participated in the formation of a Marxist discussion group. (J.A. 15-16.)

The letter also enclosed interrogatories (J.A. 16-20). These assumed the truth of the allegations made in the narrative statement and asked for further details.² The letter advised that appellant was "at liberty to refuse to submit written answers to the interrogatories," and that he could submit such written statement as he saw fit concerning the allegations of the narrative statement (J.A. 13).

²For example, interrogatory 8 read as follows (J.A. 18): "8. You are known to have attended meetings of the Communist Party, USA in New York and California since 1946. a. When and where have you attended meetings of the Communist Party, USA? Who were the members of the Communist Party in attendance at these meetings? List their names and addresses. Were members of the Communist Party indoctrinated in the principles of world revolution at these meetings? Were these meetings open to the public and were they publicly announced in advance? If not, explain the reason or reasons for secretiveness in the management of Communist Party affairs. What topics were discussed at these meetings?"

On September 13, 1951, appellant wrote the Chief of Naval Personnel asserting his loyalty to the United States and denying that he had ever advocated, or knowingly associated with anyone who advocated, the violent overthrow of the government. Appellant added: "However, if the Navy Department feels that it is necessary that I be separated from the service I am willing to resign my commission as Lieutenant junior grade, and I hereby do so." (J.A. 22-23.) Appellant did not otherwise respond to the interrogatories.

The next communication received by appellant was a letter from the Commandant of the Fourth Naval District, dated May 23, 1952 (J.A. 4-6). This letter offered appellant a hearing before a board of officers for the purpose of obtaining "an opinion from officers, believed to be impartial, as to whether there is or is not reasonable ground to doubt your loyalty." The letter stated that "although no process exists to compel the attendance of witnesses in your behalf before the board, any witnesses appearing voluntarily may be examined and cross-examined on all matters germane to the hearing." It advised "that any hearing held in your case will not be, in any sense of the word, a trial or any adjudication. The common-law rules of evidence do not apply and any ex parte statements and letters, sworn or unsworn, may be freely exhibited to the board by you and the recorder and made a part of the record in your case." The letter also stated that if appellant did not desire a hearing he could submit a resignation of his commission "for the good of the service" on the understanding that if the resignation were accepted he would be discharged under conditions other than honorable.

On June 13, 1952, appellant wrote the Commandant, "Having duly considered with the advice of counsel the allegations of disloyal conduct . . . the nature of the proposed hearing . . . I do not desire a hearing." In the same communication appellant reaffirmed his loyalty and resubmitted a resignation of his commission, but not "for the good of the service." He also stated, "Furthermore that I should incur

any penalty through the character of my separation is grossly unjust and totally out of character with the service I have rendered." (J.A. 25-27.)

On July 31, 1952, appellant was discharged from the Naval Reserve "under conditions other than honorable for the good of the service" (J.A. 27-28). The basis for the discharge was stated as follows (J.A. 27):

"This action is taken by reason of doubt cast upon your loyalty to the United States of America as indicated by your membership in, attendance at meetings of, and financial contributions to the Communist Party, U. S. A. Your statement, submitted in response to these allegations, has been reviewed and it is considered that it does not satisfactorily explain or refute the foregoing. It is noted that although you were advised that your statement was not considered satisfactory, you failed to avail yourself of an opportunity afforded you for a personal hearing before a board of officers convened by the Commandant, FOURTH Naval District."

On or about January 20, 1963, appellant applied to the Navy Discharge Review Board to have his discharge changed to honorable (J.A. 3, 10).³ No evidence was tendered to the Board, but appellant submitted a brief in support of his application (J.A. 29). On November 8, 1963, the Board decided that the original discharge was proper and should not be changed (J.A. 29, 31).⁴ The Board's decision was approved by the Under Secretary of the Navy on December 5, 1963 (J.A. 31).

³The Board may review a discharge on an application filed within 15 years after the discharge. 10 U.S. Code § 1553.

⁴Since appellant did not seek or have an evidentiary hearing before the Board, relying instead on the legal arguments which are advanced here, the Board was not, of course, required to make detailed findings of fact as in *Bourg v. Nitze*, U.S. App. D.C., No. 20,584, decided Oct. 17, 1967.

After appellant filed his complaint, the District Court stayed further proceedings before it until appellant should apply for relief to the Board for Correction of Naval Records (J.A. 55-56). Cf. *Ogden v. Zuckert*, 111 U.S. App. D.C. 398, 298 F.2d 312. Appellant thereupon made an application for relief to that Board, which denied the application on June 20, 1967 (J.A. 56-57). The parties then filed renewed cross-motions for summary judgment (J.A. 58), and the court granted judgment for appellee (J.A. 59).

STATEMENT OF POINTS

The District Court erred in granting appellee's motion for summary judgment, denying appellant's motion for summary judgment, and dismissing the action, for the reasons that:

1. The derogatory discharge of appellant exceeded the statutory authority of the Secretary of the Navy because it was not based on the character of appellant's military service.
2. The derogatory discharge was invalid because appellant was not afforded a genuine hearing with the right of confrontation.
3. The derogatory discharge violated the First Amendment and due process of law.

SUMMARY OF ARGUMENT

I.

The grounds for the derogatory discharge were "by reason of doubt cast upon your loyalty to the United States of America as indicated by your membership in, attendance at meetings of, and financial contributions to the Communist Party, U. S. A." The Secretary made no findings, and there was no basis for finding, that these associations or any doubt generated by them affected the character of appellant's military service or that his performance of his military duties was in any way deficient.

Under *Harmon v. Brucker*, 355 U.S. 579, the Secretary of the Navy lacks statutory authority to base a derogatory discharge on activities and associations which did not affect the character of the individual's military service. The *Harmon* rule is not limited to prohibiting reliance on pre-induction conduct. Hence the derogatory discharge of appellant exceeded the Secretary's powers.

II.

The Secretary lacks statutory power to issue a derogatory discharge because of political associations or expressions without at least offering the individual a genuine hearing with the right to confront the witnesses. The "hearing" offered appellant was not a genuine hearing since its stated purpose was to obtain an opinion rather than an adjudication. Moreover, the offer expressly excluded the right of confrontation.

Appellant did not waive his procedural rights by rejecting the Secretary's offer. A refusal of an inadequate hearing without the right of confrontation is not a refusal of an adequate hearing with that right. And a waiver of a fundamental right may not be inferred from a failure to demand it.

III.

A discharge which is less than honorable is a severe governmental sanction which discriminates against the recipient, injures his interest in reputation, and punishes him. The Supreme Court has repeatedly held, on First Amendment and due process grounds that governmental sanctions may not be imposed on account of membership in the Communist Party unless the individual knows of the organization's alleged illegal purpose, has the specific intent to further such a purpose, and is an active member. The Secretary made no findings as to appellant's knowledge, intent and activity. Hence the derogatory discharge violated the First Amendment and substantive due process.

Appellant does not contest on constitutional grounds the power of the Secretary to expel military personnel for causes which could not constitutionally sustain other types of adverse governmental action. But the reasons for this special prerogative are satisfied by allowing the Secretary power to separate by an honorable discharge. The Secretary may not constitutionally punish for such causes by issuing a less than honorable discharge.

ARGUMENT

I. The derogatory discharge exceeded the statutory authority of the Secretary of the Navy because it was not based on the character of appellant's military service.

This case challenges the validity of appellant's discharge from the Naval Reserve "under conditions other than honorable." Only the character of the discharge is in issue. Appellant does not contest the authority of the Secretary of the Navy to discharge him from the Reserve provided the discharge is honorable.

The jurisdiction of the courts to review the validity of a derogatory military discharge is settled. *Harmon v. Brucker*, 355 U.S. 579; *Bland v. Connally*, 110 U.S. App. D.C. 375, 293 F.2d 852; *Bourg v. Nitze*, *supra*. The same cases establish that a discharge other than honorable inflicts a stigma which is per se an irreparable injury furnishing a foundation for injunctive relief.

The Secretary's stated grounds for discharging appellant "under conditions other than honorable" were "by reason of doubt cast upon your loyalty to the United States of America as indicated by your membership in, attendance at meetings of, and financial contributions to the Communist Party, U. S. A." (J.A. 27).

It is thus apparent that the derogatory discharge was based not on the nature or character of appellant's military serv-

ice, but on findings of extra-military political associations. The Secretary made no finding that these associations or any doubt generated by them affected appellant's performance of his military duties. Indeed, there was no finding or evidence that this performance was wanting in any respect or for any reason. Furthermore, the satisfactory performance of appellant's military responsibilities was demonstrated by the fact that he was awarded a certificate of satisfactory service when he was released from active duty and thereafter engaged in no military activity.

Harmon v. Brucker, 355 U.S. 579, establishes that the Secretary exceeded his statutory powers in issuing a derogatory discharge to appellant for activities and associations which did not affect the quality of his military service. In *Harmon*, the Secretary of the Army had discharged two soldiers "in form other than 'honorable.' In so doing he took into account preinduction activities of petitioners⁵ rather than basing his action exclusively upon the record of their military service." (*Harmon* at 580.) The Court held that the Secretary had thereby exceeded his statutory authority for the reason that "the statute, properly construed, means that the type of discharge to be issued is to be determined solely by the soldier's *military record in the Army*" (at 583, emphasis supplied). A clarification of "military record in the Army" is supplied by the fact that the Court described as "An authoritative construction of the congressional grant of power" passages in Army regulations which stated that a purpose of a discharge certificate is "*to specify the character of service rendered during the period covered by the discharge*" and that "it is essential that all pertinent factors be considered so that the type of discharge will reflect accurately the nature of service rendered." (*Ibid.*, emphasis the Court's.)

⁵These included associations with Communists (petitioner Harmon) and membership in the Communist Party (petitioner Abramowitz). See *Harmon v. Brucker*, 100 U.S. App. D.C. 190, 243 F.2d 613; Joint Appendix, pp. 5-6, in *Abramowitz v. Brucker*, No. 13,587 in this Court.

The *Harmon* rule is, of course, applicable to Navy as well as Army discharges.⁶ *Bland v. Connally*, 110 U.S. App. D.C. 375, 379, 293 F.2d 852, 856; *Bourg v. Nitze*, *supra*, at n. 8. In *Harmon* the Secretary had relied on preinduction conduct, and that is not the situation here.⁷ But the principal of *Harmon* is not limited to prohibiting reliance on pre-induction conduct. As we have seen, the theory which *Harmon* announced and applied was that the Secretary may take into account, in determining the kind of discharge, only the character or nature of the military service rendered during the period covered by the discharge. *Harmon* thus forbids reliance on post-induction conduct which did not affect the character of the military service. We have also seen that in discharging appellant under conditions other than honorable, the Secretary ignored the satisfactory nature of appellant's service and took into account only political associations which in no way affected his service. Hence the derogatory discharge of appellant is condemned by *Harmon*.

⁶*Harmon* derived its rationale from the statute (former 38 U.S. Code § 693h, now, in revised form, 10 U.S. Code § 1553) which governs Boards of Review of both military services.

⁷The Secretary's statement of the reasons for appellant's discharge (J.A. 27) shows that the Communist Party membership, meeting attendance, and financial contributions referred to in the statement were the same as those alleged in the narrative statement sent appellant on July 31, 1951. The latter statement dated the membership and meetings as "since 1946" and the financial contributions as "in 1948" (J.A. 15-16). Appellant held his commission as a lieutenant (j.g.) in the Naval Reserve from June 16, 1945 to July 31, 1952, being on active duty from July 10, 1946 to June 8, 1948. *Supra*, pp. 2, 5.

II. The derogatory discharge was invalid because appellant was not afforded a genuine hearing with the right of confrontation.

In *Bland v. Connally*, *supra*, and *Davis v. Stahr*, 110 U.S. App. D.C. 383, 293 F.2d 860, this Court held that the Secretaries of the Navy and Army lack statutory power to issue derogatory discharges to reservists because of political associations or expressions without at least affording hearings with the right to confront the witnesses. In both cases, the Court set aside derogatory discharges of reservists who had attended hearings but had declined to participate when the Service failed to put on witnesses.

The present case differs in that appellant declined to participate at an earlier stage; he rejected the offer to hold a hearing. The difference is not of consequence because the offer was not of a genuine hearing with the right of confrontation. The letter which offered the "hearing" described it as follows (J.A. 6):

"8. You are advised that any hearing held in your case will not be, in any sense of the word, a trial or any adjudication. The common-law rules of evidence do not apply and any ex parte statements and letters, sworn or unsworn, may be freely exhibited to the board by you and the recorder and made a part of the record in your case. The sole purpose of the hearing is to obtain an opinion from officers, believed to be impartial, as to whether there is or is not reasonable ground to doubt your loyalty."

A "hearing" which is not "in any sense of the word, a trial or any adjudication," and whose "sole purpose" is "to obtain an opinion" on the individual's loyalty, is plainly not a hearing at all, but an inquisition and ordeal. And, of course, the right of confrontation was excluded in advance by the ground rules permitting the introduction of ex parte, and even unsworn, statements and letters.

The Navy, therefore, did not offer appellant, nor did he in fact receive, the procedures which are prerequisite to a

derogatory discharge. Accordingly, the discharge was invalid unless appellant waived his procedural rights. This appellant did not do.

In his letter of June 13, 1952, appellant stated that after having considered the allegations of disloyalty and "the nature of the proposed hearing . . . I do not desire a hearing" (J.A. 25). In view of this language, and because it is necessary to "indulge every reasonable presumption against the waiver of fundamental rights" (*Glasser v. United States*, 315 U.S. 60, 70), the only permissible construction of appellant's statement is that he did not desire a hearing of the kind that was offered him — that is, a non-hearing without the right of confrontation. It cannot rationally be concluded that a refusal of this non-hearing was also a refusal of a genuine hearing with the right of confrontation.

Neither can it be held that appellant waived his rights by not demanding them in the face of the inadequate offer. A failure to demand a basic procedural right does not waive it. Waiver requires an "affirmative acquiescence" in dispensing with the right (*Carnley v. Cochran*, 369 U.S. 506, 516-17) and may not be inferred from silence. *Miranda v. Arizona*, 384 U.S. 436, 470, 471, 475. Cf. *Brookhart v. Janis*, 384 U.S. 1.

III. The derogatory discharge was unconstitutional.

A discharge "under conditions other than honorable" is a severe governmental sanction. It discriminates against the recipient, injures his interest in reputation, prejudices his ability to obtain employment, and punishes him. "Since the vast majority of discharges from the armed forces are honorable, anything less than an honorable discharge stigmatizes the recipient and is punitive in nature." *Bourg v. Nitze, supra*, at n. 1. "What is at stake, therefore, is merely the Navy's right to punish or label, and not its right to secure itself against subversives." *Bland v. Connally, supra*, 110 U.S. App. D.C. at 381, 293 F.2d at 858. See also *Clackum v. United States*, 296 F.2d 226, 227 (Ct. Cl.).

In the present case, appellant was punished not on a finding that he actually was disloyal or did not satisfactorily perform his military duties, but on unadorned findings of political association from which the Secretary acquired a subjective doubt as to his loyalty. The Secretary made no findings, and there was no basis for finding, that (a) appellant knew or believed that the Communist Party had a bad purpose; (b) that he subscribed to or participated in any unlawful aims or activity of that organization; (c) that he had an intent to effectuate or further any such unlawful purpose; (d) that he was an active member of the Communist Party.

By reason of the lack of such findings, the Secretary's action clearly violated the First Amendment and substantive due process. For the Supreme Court has repeatedly held that absent the elements listed in the preceding paragraph, membership in or association with the Communist Party does not supply a valid basis for the government to classify an individual as a loyalty or security risk and to impose on him sanctions, discriminations or punishment. The decisions establishing this principle and the sanctions which they involved include: *Aptheker v. Secretary of State*, 378 U.S. 500 (withholding of passports); *United States v. Robel*, 389 U.S. 258 (exclusion from employment in defense facilities); *Elfbrandt v. Russell*, 384 U.S. 11 (exclusion from government employment); *Keyishian v. Board of Regents*, 385 U.S. 589 (exclusion from employment as public school teacher); *Wiemer v. Updegraff*, 344 U.S. 183 (exclusion from government employment); *Scales v. United States*, 367 U.S. 203 (criminal punishment).

As to the First Amendment, the theory of these decisions is that membership in the Communist Party is an exercise of the right of association protected by that Amendment; that therefore such membership may be governmentally deterred only with a sufficient justification; and that no such justification exists without the elements of guilty knowledge, intent and participation.

As to due process, the theory is that the government may not rationally classify Communist Party members as loyalty or security risks in the absence of those elements, and sanctions imposed for innocent membership deprive the member of interests in liberty or property without adequate justification.

These theories, developed as to Communist Party membership, apply a fortiori to the additional matters found against appellant—attendance at Communist Party meetings and financial contributions to the Communist Party.

Aptheker invalidated a federal statute which prohibited the issuance of passports to members of the Communist Party. It did so in a suit brought by two top leaders of the Communist Party to enjoin the withholding of passports. It held that the statute violated substantive due process because it "indiscriminately excludes plainly relevant considerations such as the individual's knowledge, activity, commitment, and purposes in and places for travel." (378 U.S. at 514.)

Here, like the statute in *Aptheker*, the Secretary inflicted a sanction on appellant without considering the "plainly relevant considerations" of appellant's "knowledge, activity, commitment and purposes." Moreover, the statute in *Aptheker* did not survive these deficiencies even though it was supported by a Congressional finding that it was needed to protect the national security (see 378 U.S. at 509). No semblance of such a justification can be advanced for the Secretary's action. Appellant was in the inactive reserve and had no military functions. He could be placed on active duty only if the Secretary chose to call him thereto. And if the Secretary wanted to eliminate him even from the inactive reserve, this could have been done by accepting appellant's tendered resignation or, had none been tendered, by an honorable discharge.

United States v. Robel, supra, is particularly pertinent to this case because it involved a federal statute which, like the Secretary's action here, was based on the war power. See

389 U.S. at 263. Nevertheless, the Court held that the statute, which excluded Communists from employment in defense facilities, unconstitutionally abridged the right of association guaranteed by the First Amendment because, "It is made irrelevant to the statute's operation that an individual may be a passive or inactive member of a designated organization, that he may be unaware of the organization's unlawful aims, or that he may disagree with those unlawful aims." (389 U.S. at 266.) The Secretary's determination here that appellant was unfit to receive an honorable discharge is infected with the identical vice.

In the *Elfbrandt* and *Keyishian* cases, the Court held that governmental sanctions could not be imposed for Communist Party membership even if the member had knowledge of the organization's allegedly unlawful purpose unless he also had a specific intent to further the unlawful aims. The Court stated in *Elfbrandt* (at 19):

"A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here. . . . Such a law cannot stand."

In *Keyishian* the Court stated:

"In *Aptheker* we held that Party membership, without knowledge of the Party's unlawful purposes *and* specific intent to further its unlawful aims, could not constitutionally warrant deprivation of the right to travel abroad." (At 606-07.)

"Thus mere Party membership, even with knowledge of the Party's unlawful goals, cannot suffice to justify criminal punishment, . . .; nor may it warrant a finding of moral unfitness justifying disbarment." (At 607.)

"We therefore hold that Civil Service Law § 105, subd. 1(c), and Education Law § 3022, subd. 2, are invalid insofar as they proscribe mere knowing mem-

bership without any showing of specific intent to further the unlawful aims of the Communist Party of the United States or of the State of New York." (At 609-10.)

In the present case, the Secretary contravened *Elfbrandt* and *Keyishian* by imposing a sanction on appellant without a showing or finding of a specific intent to further the organization's unlawful aims. The Secretary contravened *Wieman v. Updegraff, supra*, by imposing the sanction without a showing or finding that appellant had knowledge that the organization had an unlawful purpose.

We are willing to assume that the military establishment has such special functions and needs that the Secretary may constitutionally expel its personnel on grounds which, under the cases just discussed, could not sustain denials of passports, of private employment in defense facilities, and of non-military governmental employment. We therefore do not question on constitutional grounds the authority of the Secretary to discharge an inactive reservist because of ill-founded doubts concerning his loyalty. But manifestly the reasons for this special prerogative are satisfied by allowing the Secretary the power to separate the individual from the service by an honorable discharge. There is no need or reason to make constitutionally protected rights yield further, in the dubious service of a "relatively weak" interest (*Bland v. Connally, supra*, 110 U.S. App. D.C. at 381, 293 F.2d at 858), by also allowing the Secretary to stigmatize and punish the individual for causes which could not sustain other adverse governmental action. The perversity of such action is particularly marked in the case of inactive reservists.

Accordingly, the cases which limit the government's power to impose sanctions for Communist Party membership control the authority of the Secretary to issue derogatory discharges on account of such membership. Under those cases, Congress could not validly provide by statute that military reservists shall be dishonorably discharged for membership or other association with the Communist Party without

regard to knowledge, intent, and the nature and extent of activity. Such a statute, furthermore, would also be invalid as a bill of attainder. *United States v. Brown*, 381 U.S. 437. What Congress cannot constitutionally enact, the Secretary of the Navy cannot constitutionally do.

CONCLUSION

The judgment below should be reversed with directions that summary judgment be entered for appellant.

Respectfully submitted,

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REPLY BRIEF FOR APPELLANT

IN THE
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v.

SECRETARY OF THE NAVY,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

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REPLY BRIEF FOR APPELLANT

1. Scope of Review.

The government's first point, supported by copious citations, is that the Court "does not have jurisdiction to direct or interfere with the exercise of [the Secretary's] discretion" (Br. 15), and "is limited to determining whether the Secretary acted within the sphere of his statutory and constitutional authority" (Br. 16). The government's earnest argumentation is wasted. Our principal brief makes it abundantly clear that our sole claims are that the Secretary exceeded his statutory power and violated the Constitution by issuing a derogatory discharge to appellant.

The government later contradicts its own description of the scope of judicial review by stating (Br. 29) that the Court need not reach the alleged violations of the First Amendment and substantive due process if it finds that the Secretary acted within his statutory authority and without procedural irregularities. In support of this assertion the government cites (Br. 30) *Harmon v. Brucker*, 355 U.S. 579, and *Bland v. Connally*, 110 U.S. App. D.C. 375, 293 F.2d 852, for the self-evident proposition that military discharge cases, like others, should be decided on non-constitutional grounds "wherever possible."

Harmon and *Bland* did not reach the issue of the Secretary's constitutional power because they held that the Secretary had exceeded his statutory power in issuing derogatory discharges. One of the considerations for the holding in *Bland* was that a ruling that the Secretary's action was statutorily authorized "would raise grave and hitherto unresolved constitutional questions involving basic First and Fifth Amendment rights." 293 F.2d at 852, and to like effect, *Davis v. Stahr*, 110 U.S. App. D.C. 383, 293 F.2d 860.

The "grave and hitherto unresolved constitutional questions" in *Bland* are also present here. Moreover, Supreme Court decisions since *Bland*, discussed in our principal brief (pp. 13-17), make the questions even graver; in our view they resolve the questions in appellant's favor. Accordingly, the presence of these questions militates for a holding that the Secretary lacked statutory authority. But if the Court finds that he had such authority, then, by the government's own definition of the scope of review and under *Harmon*, *Bland* and *Davis*, the Court is obliged to decide the constitutional issues.

2. The lack of statutory authority because the derogatory discharge was not based on the character of appellant's military service.

We argued in our principal brief (pp. 8-10), that under the principle of *Harmon v. Brucker, supra*, the Secretary exceeded his statutory authority because the derogatory discharge was not based on the character of appellant's military service. As best as we can make it out, the government asserts two grounds for claiming that *Harmon* was not infringed.

The first (Br. 20) is a contention that the Secretary could reasonably have entertained doubts as to appellant's loyalty by reason of his political associations (which the government prefers to call "subversive activities"). But though doubts as to an officer's loyalty may be a reason to discharge him, under *Harmon* such doubts are plainly not a valid cause for a *punitive* discharge if the doubt-causing factors did not adversely affect his military service. That is the situation here, since the record establishes that appellant's military service was exemplary, and that neither the political associations found against him nor the doubts they engendered in the Secretary's mind in any way affected, or were found to have affected, his military service.

The government concedes, as it must under *Harmon*, that a derogatory discharge may not be based on doubts of loyalty arising from pre-induction conduct. Yet it is obvious that such doubts can just as reasonably stem from pre-induction conduct as from post-induction conduct. So the Secretary could rationally doubt the loyalty of a reservist who had been actively promoting insurrection up to the moment of induction, even though he ceased his seditious activity upon entering the military service. Nevertheless, as *Harmon* holds, the Secretary would be exceeding his statutory authority in issuing a *derogatory* discharge because of his well-founded doubts. This demonstrates that doubts as to loyalty, no matter how reasonable, cannot justify a *derogatory* discharge. Such a discharge may be issued not

because of a state of mind of the Secretary, but only because of conduct which affected the inductee's military service.

The government's second ground for distinguishing *Harmon* (Br. 20-21) is that it involved pre-induction activities, while here the political associations were found to have occurred while appellant was still in the Naval Reserve, including both a period of active service and the period in which, as an inactive reservist, he engaged in no military activities at all. As explained in our principal Brief (p. 10), it misreads *Harmon* to assume that it merely prohibits reliance on pre-induction conduct in determining the character of the discharge. *Harmon* prohibits reliance for this purpose on any conduct, pre-induction or post-induction, which did not affect the character of the military service.

Nor is the government's argument advanced by its quotation (Br. 23) from Judge Sirica's ill-reasoned opinion in *Olenick v. Brucker*, 173 F.Supp. 493, reversed on other grounds, 107 U.S. App. D.C. 152, 273 F.2d 819. All that opinion shows is that Judge Sirica misunderstood *Harmon* on a previous occasion as well as in this case.

3. The denial of a genuine hearing with the right of confrontation.

The government's argument (Br. 25-29) that appellant waived his procedural rights chooses to ignore our analysis. The waiver contention could have substance if the Navy had simply offered appellant a hearing without saying anything about its nature. In that event, appellant might have had no basis for assuming that he would not be accorded a valid proceeding. In fact, however, what the Navy offered appellant was, by its stated terms, a non-hearing without the right of confrontation. Thus appellant was not offered the procedures to which he was entitled.

There is a presumption against waiver (*Von Moltke v. Gillies*, 332 U.S. 708, 723), and waiver requires an affirmative acquiescence, not merely a failure to demand one's

rights (our principal Brief, p. 12). Accordingly, appellant did not waive his right to a genuine, confrontation hearing either by refusing the Navy's offer of a spurious, non-confrontation hearing or by failing to make a counter-offer as to the kind of hearing he would attend.

4. The First Amendment and substantive due process.

The government argues that the naval loyalty regulations in effect at the time of appellant's discharge did not violate the First Amendment or substantive due process because they "did not attempt to regulate speech or association (Br. 30);" were directed toward the legitimate governmental objective of "eliminating from the Naval Reserve individuals who were of doubtful loyalty" (*ibid.*); and "provided that membership or participation *alone* in a prescribed organization did not conclusively establish disloyalty" (Br. 31). The government also contends (Br. 41) that substantive due process was satisfied because "the type of discharge issued also had a real and substantial relationship to the object to be achieved," that "object" being, by the government's view, the elimination of loyalty risks from the Reserves.

The government's arguments are beside the point.

First, we are not attacking the regulations referred to. These provided procedures and standards for screening out undesired personnel, but did not specify the type of discharge to be accorded. As we repeatedly emphasized in our principal Brief, we are contesting not the authority of the Secretary to discharge appellant, but his power to do so *by means of a stigmatizing discharge*.

Secondly, the punitive type of discharge cannot be justified by the suggested objective of eliminating loyalty risks or, as the government colorfully asserts (Br. 30-31), "by the imperative need . . . that all personnel in the armed forces must meet the highest standards of loyalty and trustworthiness as they constitute the sensitive front line of our national defense." That objective and that "imperative need" are fulfilled by *any* kind of discharge. The government's only

conceivable interest in a derogatory discharge is to prevent "dilution of the value of an honorable discharge," an interest described in *Bland v. Connally*, *supra*, not as an "imperative need," but as "so relatively weak." 110 U.S. App. D.C. at 381, 293 F.2d at 858. And even this weak interest and the morale of the armed forces are, by rational standards, ill-served by a system in which the Secretary plays Big Brother to judge and condemn service personnel for private political associations which do not affect their military service.

Thirdly, the Secretary issued a derogatory discharge to appellant solely on findings of bare political association. This seems to us "an attempt to regulate speech or association." But it makes no difference whether one calls it so or not. Under current Supreme Court doctrine, developed in *United States v. Robel*, 389 U.S. 258; *Keyishian v. Board of Regents*, 385 U.S. 589; *Elfbrandt v. Russell*, 384 U.S. 11; *Aptheker v. Secretary of State*, 378 U.S. 500; and *Wieman v. Updegraff*, 344 U.S. 183, the government violates the First Amendment and substantive due process by classifying an individual as disloyal and imposing a sanction on him because of Communist Party membership not accompanied by guilty knowledge, intent, and participation. See our principal brief, pp. 13-17.

The government argues (Br. 35) that the doctrine of these cases was satisfied because the naval regulations "provided for full consideration of all information relating to an individual's knowledge, commitment and purpose in membership." In our view, the regulations obviously did not require (though they did not necessarily preclude) adherence to the cited decisions.* But whatever the regulations pro-

*The regulations require "consideration of the entire record," but nowhere indicate the factors which could rebut the "prima facie case of doubtful loyalty" established by organizational membership or participation (Gov. Br. 51). Therefore, so far as the text of the regulations is concerned, the Navy could, for example, find a reservist disloyal for Communist Party membership with knowledge that the

vided, the Secretary's *action* violated constitutional requirements because it was based on political association without regard to the other factors which must exist in order to justify the imposition of sanctions.

The government's citation of cases is as indiscriminating as its reasoning. Some of the government's cases are thoroughly irrelevant, such as *Lerner v. Casey*, 357 U.S. 468, which upheld the right of a public employer to discharge an employee for refusing to answer its questions on Fifth Amendment grounds. Assuming that *Lerner* survives *Spevack v. Klein*, 385 U.S. 511, nevertheless it has no applicability here. Appellant was not discharged for refusing to answer the Navy's interrogatories. Indeed, the Navy expressly told him that he was "at liberty to refuse to submit written answers to the interrogatories directed to you" (JA 13).

The government cites, without appropriate notice, *Gerende v. Board of Supervisors*, 341 U.S. 56, overruled by *Whitehill v. Elkins*, 389 U.S. 54; *American Communications Association v. Douds*, 339 U.S. 382, overruled by *United States v. Brown*, 381 U.S. 437; and *Adler v. Board of Education*, 342 U.S. 485, overruled by *Keyishian v. Board of Regents*, *supra*. The government also quotes from *Harmon v. Brucker*, 100 U.S. App. D.C. 190, 243 F.2d 613, but is sufficiently alert to note the reversal of that decision by 355 U.S. 579.

Respectfully submitted,

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organization had illegal purposes, even if it believed that he did not have the specific intent to further such purposes. Yet such an intent is a requisite under *Elfbrandt* and *Keyishian*. Here the Secretary found neither guilty knowledge nor intent.

See Hanks
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10 am
(3)

BRIEF FOR APPELLEE

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,742

CHARLES KENNEDY, APPELLANT

v.

SECRETARY OF THE NAVY, APPELLEE

Appeal from the United States District Court
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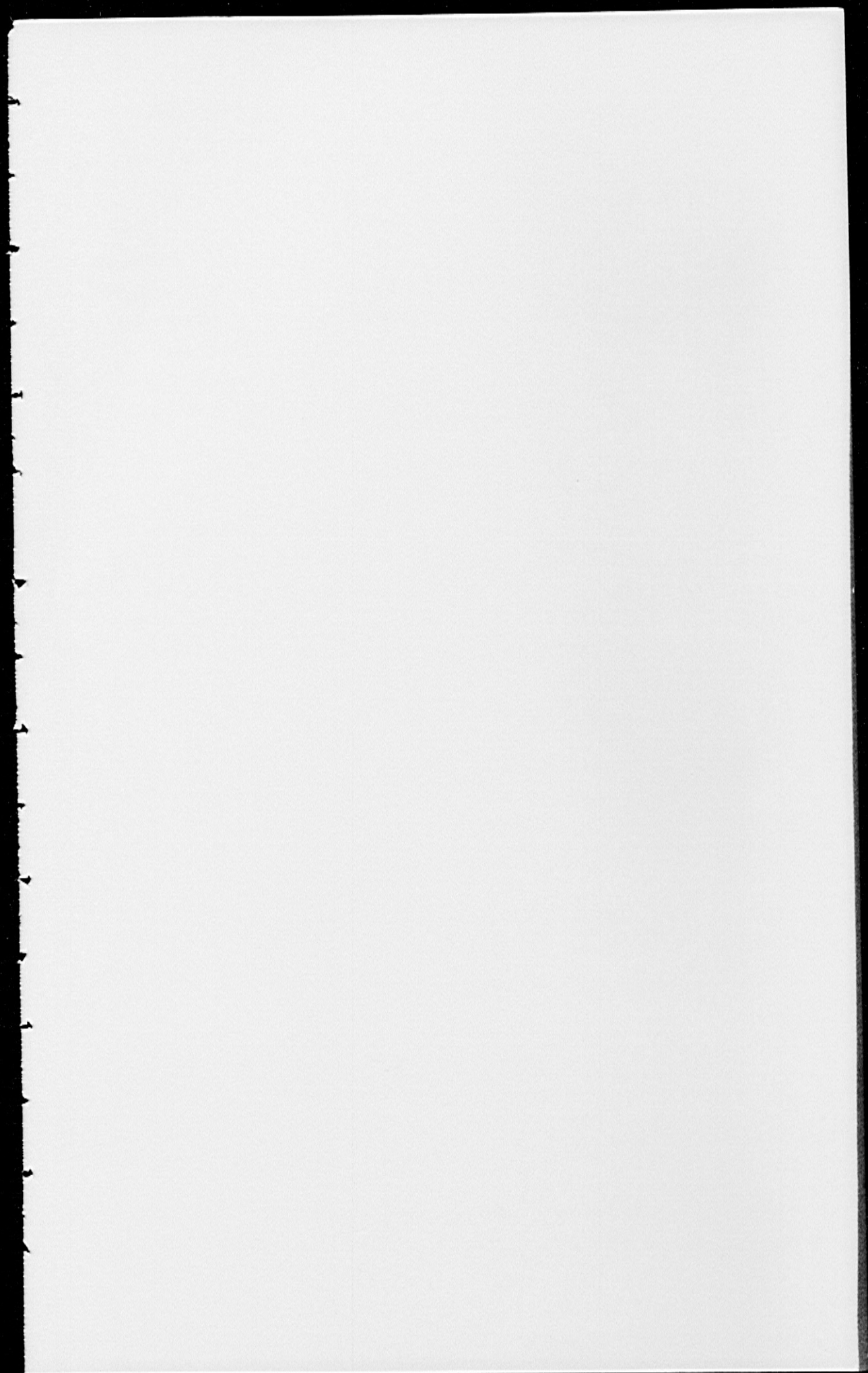
United States Court of Appeals
for the District of Columbia Circuit

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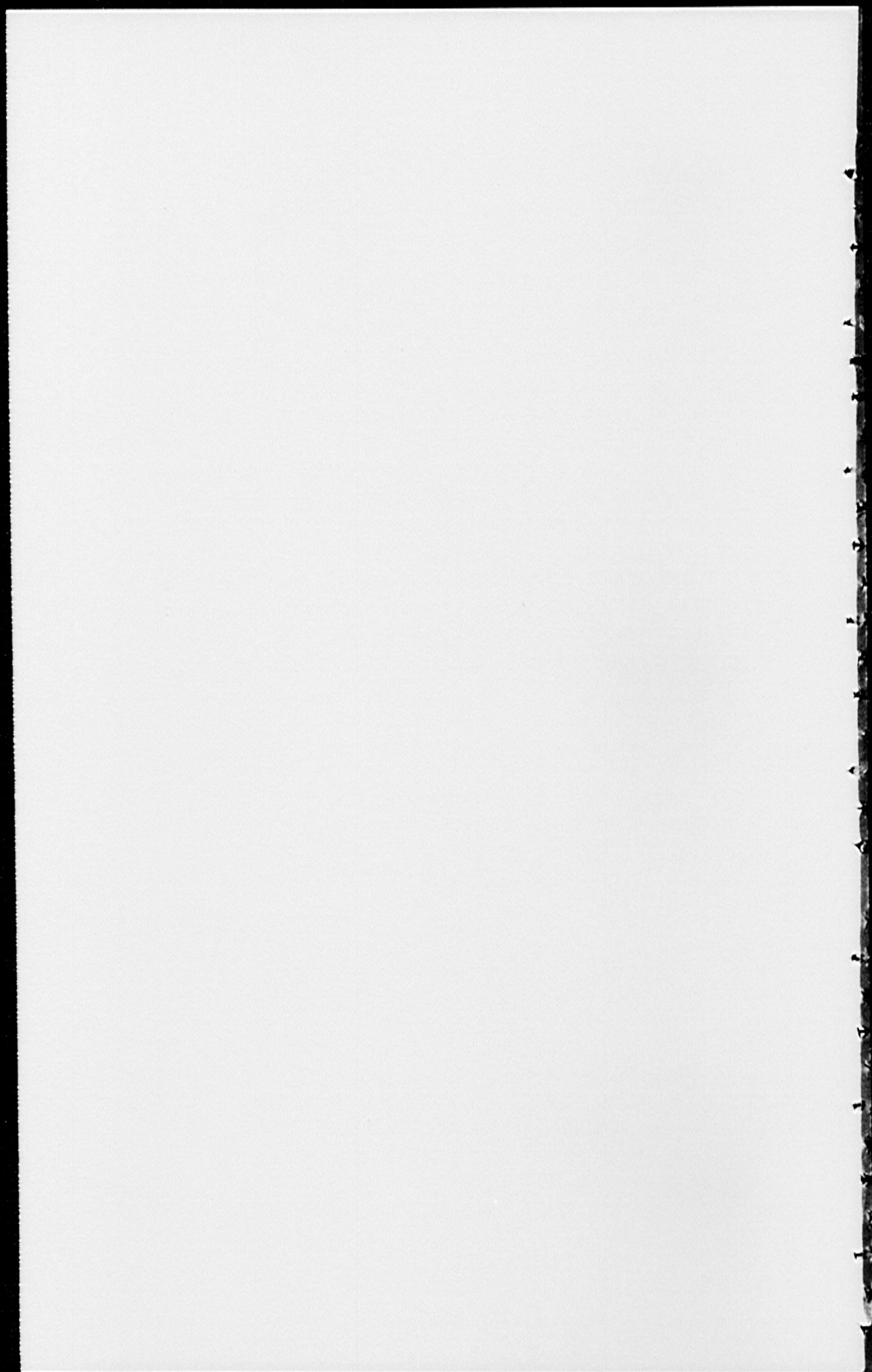
QUESTIONS PRESENTED

The questions are correctly stated by appellant, as follows:

1. Whether the Secretary of the Navy exceeded his statutory authority by issuing a discharge "under conditions other than honorable" to an officer in the inactive Naval Reserve on grounds of membership in and association with the Communist Party, when such membership and association had not affected the character of the officer's military service.

2. Whether the derogatory discharge was invalid because the Secretary had not offered the officer a genuine hearing with the right of confrontation and the officer had not waived such a hearing.

3. Whether the derogatory discharge violated the First Amendment and due process because it was based on political association without regard to the officer's knowledge, intent, and the nature and extent of his activity.



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IN THE
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No. 21,742

CHARLES KENNEDY, APPELLANT

v.

SECRETARY OF THE NAVY, APPELLEE

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant's Military Service

Appellant entered in the inactive reserve on May 21, 1942 as an officer (Ensign, Hospital Voluntary Probationary) and resigned May 7, 1943 under honorable conditions. He reenlisted in the inactive reserve on May 8, 1943 as an Apprentice Seaman, remaining in that status until June 30, 1943. On July 1, 1943 he reported for active duty at the Naval Training Unit, University of Rochester School of Medicine, Rochester, New York, serving honorably in this capacity until June 15, 1945, during

which time he pursued a course in medicine in the Naval College Training Program, completing 8 terms of an 8 term course. From May 8, 1943 to June 15, 1945, appellant received pay and allowances while undergoing medical training at the University of Rochester School of Medicine. His separation on June 15, 1945 was to accept a commission as a Lieutenant (J.G.), Medical Corps, U. S. Naval Reserve. He was in the inactive reserve from June 16, 1945 to July 9, 1946.

Appellant served on active duty from July 10, 1946 until June 8, 1948, when he was released from active naval service "under honorable conditions," issued a certificate of Satisfactory Service, and transferred to inactive duty in the Naval Reserve.

Pursuant to a written request of the appellant dated May 9, 1950, appellant was transferred to the United States Naval Reserve Officer Inactive Status List effective June 1, 1950. The effects of this transfer, as stated in the letter to the appellant from the Chief of Naval Personnel dated May 19, 1950, were as follows:

While you are on the subject list you will not be eligible for promotion or for training in the Naval Reserve Program. You will not be considered immediately available but may be called to active duty in the event of any future national emergency. Attention is invited to two of your continuing responsibilities: (1) advising the Commandant of any change of address, and (2) completing and submitting the Annual Qualification Questionnaire (Form Navpers 319).

On July 31, 1952 the Secretary of the Navy discharged appellant from the United States Naval Reserve "under conditions other than honorable for the good of the service", for acts committed while he was a member of the active and inactive reserve.

From the time of appellant's separation from active duty June 8, 1948 until the time of his discharge from the Naval Reserve, appellant remained in an inactive duty status. He was not entitled to nor received any

compensation or other emoluments and was not entitled to nor acquired any retirement rights or benefits other than those to which he was already entitled by virtue of his service in the active military forces. However, as a member of the Naval Reserve, he remained subject to the lawful jurisdiction and control of the Department of the Navy over such reserves.

Administrative and Court Proceedings Relative to Discharge

The Chief of Naval Personnel sent a letter to appellant dated July 31, 1951 under the subject, "Alleged conduct or association casting doubt upon loyalty; opportunity to submit written answers to interrogatories and/or written statements concerning." (J.A. pp. 11-14).¹ The letter advised appellant that it had been determined that there was sufficient credible, concrete, and factual evidence available to establish, *prima facie*, conduct or association on his part similar to those described in SECNAV Letter P1-6 of January 10, 1949, Navy Department Bulletin 49-15, which directed the separation from the Naval Service of members whose conduct and association cast doubt upon their loyalty which directive was issued in implementation of Executive Order No. 9835 of March 21, 1947. The letter referred appellant to accompanying enclosures, i.e., (1) the Narrative Statement (J.A. pp. 15-16), (2) Interrogatories (J.A. pp. 16-20), and (3) a List of Organizations designated by the Attorney General. Appellant was advised that the enclosed interrogatories were forwarded with a view toward giving him an opportunity to present matter within his knowledge corroborating, explaining, expanding, or tending to refute assertions made or inferences arising from assertions made in the narrative statement; and that he could submit answers to the interrogatories and/or such written statement as he wished concerning the assertions made and he could consult counsel with regard to the entire matter. Appellant was also advised that he could refuse

¹ J.A. refers to the Joint Appendix.

to submit answers to the interrogatories, or any other written statement in his own behalf. Appellant was asked to either (1) acknowledge receipt of the letter, indicating within what reasonable period of time answers would be prepared and forwarded to the Chief of Naval Personnel, it was indicated that a period of 60 days from the date of the Chief of Naval Personnel's letter was allowed for submission of answers and that this period could be extended at the discretion of the Chief of Naval Personnel upon written request setting forth good cause therefor, or (2) appellant could acknowledge receipt indicating that he did not desire to submit answers in which case further action under BuPers Circular Letter No. 4-49, Pers. 32, P1-6, of 10 January 1949, Navy Department Bulletin 49-27, would be initiated immediately. (J.A. 35-45). In the absence of any communication from plaintiff, it was indicated that further action under the BuPers Circular Letter, *supra*, would be held in abeyance for a period of 45 days from the date of the letter.

The narrative statement accompanying the letter disclosed information that appellant had been a member of the Communist Party, USA, since 1946, attended meetings of the Communist Party, USA in New York and Connecticut since 1946, made financial contributions to the Communist Party, USA in 1948, attended Communist Party social functions in Connecticut during 1949, had been active since 1947 in the affairs of the Progressive Citizens of America, which organization had been cited by the California Committee on Un-American Activities as a new and broader Communist front for the entire United States, and, during 1946, participated in the formation of a Marxist discussion group.

On August 24, 1951 the appellant acknowledged receipt of the July 31, 1951 letter and stated, *inter alia*, that "prompt action may be expected on my part after counsel has been consulted." (J.A. pp. 20-21).

By letter dated September 13, 1951 (J.A. pp. 22-23) appellant responded further to the July 31, 1951 letter. In this letter appellant, *inter alia*, stated "Whatever sig-

nificance may be assigned by others to my past political thinking or actions I categorically deny that I have ever advocated the violent or forceful overthrow of the United States Government and I have not knowingly associated with any individual who had advocated this." Appellant also submitted a resignation of his commission. Appellant did not respond to the set of interrogatories furnished him, nor did he request a hearing.

On May 23, 1952, the Commandant, Fourth Naval District, wrote to appellant (J.A. pp. 4-6) referring to BuPers Circular Letter No. 4-49, of January 10, 1949; and informed appellant of the receipt of information tending to cast doubt upon his loyalty to the United States Government and that he was afforded an opportunity to appear and be heard before a board convened for the purpose on June 9, 1952. Appellant was also advised that he could be represented by counsel of his choice; that the sole purpose of the hearing would be to obtain an opinion from officers, believed to be impartial, as to "whether there is or is not reasonable ground to doubt your loyalty." Appellant was advised that he could challenge members of the board for cause; that any witnesses appearing voluntarily could be examined and cross-examined; that *ex parte* statements and letters, sworn or unsworn, could be freely exhibited to the board and made a part of the record; and that he could request a reasonable postponement of the hearing date to permit the obtaining of evidence or other preparation of his case. Appellant was further advised that if he did not desire a hearing, he could submit a resignation "for the good of the service" with the understanding that such resignation, if accepted, would result in a discharge "under conditions other than honorable."

Upon appellant's request, the proposed June 9, 1952 hearing date was rescheduled for June 16, 1952 (J.A. pp. 24-25).

As of June 13, 1952 (J.A. pp. 25-27), appellant replied, "Having duly considered with the advice of counsel the allegations of disloyal conduct as outlined in refer-

ence (a) the nature of the proposed hearing as described in reference (b) I do not desire a hearing." In this letter the appellant resubmitted his resignation, but not "for the good of the service."

By letter dated July 31, 1952, the Secretary of the Navy notified appellant that, by direction of the President, he was discharged from the Naval Reserve under conditions other than honorable for the good of the service; and:

This action is taken by reason of doubt cast upon your loyalty to the United States of America as indicated by your membership in, attendance at meetings of, and financial contributions to the Communist Party, USA. Your statement, submitted in response to these allegations, has been reviewed and it is considered that it does not satisfactorily explain or refute the foregoing. It is noted that although you were advised that your statement was not considered satisfactory, you failed to avail yourself of an opportunity afforded you for a personal hearing before a board of officers convened by the Commandant, FOURTH Naval District.

(J.A. pp. 27-28).

Eleven years later, on or about January 20, 1963, appellant petitioned the Navy Discharge Review Board, established under 10 U.S.C. 1553, and requested a change in the character of his discharge, i.e., the withdrawal of his discharge under conditions other than honorable and the issuance of an honorable discharge. (J.A. pp. 29-31). The Board on November 8, 1963 determined that no change should be made in the character of the discharge issued, stating:

After careful consideration of the facts presented in all available records of the Department of the Navy and of the claims and evidence submitted, the Board finds that the discharge was proper and equitable under standards of law and discipline applicable at the time, or since made applicable, and that the dis-

charge accurately reflects petitioner's conduct and character during the period of service which was terminated by the discharge. Not finding sufficient evidence to support a contrary conclusion, the Board concludes that no change, correction or modification should be made in the type or character of the discharge. It is the decision of the Board that the character of the discharge originally issued is proper and that no change, correction, or modification be made in the Under Conditions Other Than Honorable Discharge.

This decision of the Board was approved by the Under Secretary of the Navy on December 5, 1963, and appellant was informed of the action by letter dated December 10, 1963.

On March 11, 1966 appellant filed this suit for a declaratory judgment and injunction against the Secretary of the Navy asking that his 1952 discharge as a Lieutenant J.G. in the Naval Reserve under conditions other than honorable be declared null and void; that an honorable discharge be issued to him in place thereof; and that there be expunged from the records of the Department of the Navy the determination that doubt had been passed on appellant's loyalty to the United States. On appellant's (plaintiff's) motion for judgment on the pleadings or for summary judgment and appellee's (defendant's) motion to stay pending exhaustion by appellant of his administrative remedy before the Board for Correction of Naval Records or to dismiss or for summary judgment, on February 23, 1967 the Court stayed further proceedings pending appellant's (plaintiff's) application for relief to the Board for Correction of Naval Records and a determination thereon.

Upon such application being filed, requesting the discharge of July 31, 1952 under conditions other than honorable be changed to an honorable discharge, the Board for Correction of Naval Records (operating under 10 U.S.C. 1552), by letter dated June 20, 1967, notified plaintiff (appellant) of the denial of his application, since

the application was not filed within three years after he discovered the alleged error or injustice and insufficient evidence had been presented to excuse the failure to file within the prescribed three years.

Renewed cross-motions for summary judgment were filed in the court proceedings. On January 29, 1968, the district court entered an order granting defendant's motion for summary judgment and dismissing the action (J.A. p. 59). An appeal to this Court was noticed February 5, 1968 (J.A. 60).

The Secretary's Authority

The Statute in existence at the time, the Naval Reserve Act of 1938, 52 Stat. 1176, 34 U.S.C. 853(d) (repealed by the Armed Forces Reserve Act of 1952, 66 Stat. 505, 50 U.S.C. 992, now 70A Stat. 89, 10 U.S.C. 1163) provided:

In time of peace no officer or man of the Naval Reserve shall be discharged except upon expiration of his term of service or upon his own request or for full and sufficient cause, in the discretion of such administrative authority as the Secretary of the Navy may designate: *Provided*, that within a reasonable time prior to discharge for cause, officers shall be given an opportunity to be heard by the Secretary of the Navy, or such administrative authority or other agency as he may designate, which opportunity will be considered as having been given through the mailing of notice to their address on file in the Navy Department: *Provided further*, That officers and enlisted men of the Naval Reserve on active duty shall be subject to separation therefrom in the same manner as may be provided by or in pursuance of law for the separation of officers and enlisted men of the Regular Navy: *And provided further*, That members of the Fleet Reserve and officers and enlisted men who may have heretofore been transferred to the retired list of the Naval Reserve Force or the Naval Reserve or the honorary retired list with pay or may hereafter be so transferred, shall not be dis-

charged therefrom prior to the expiration of their term of service, without their consent, except by sentence of a court martial, or, in the discretion of the Secretary of the Navy, when sentenced by civil authorities to confinement in a State or Federal penitentiary as a result of a conviction for a felony.

Under this statute the Secretary of the Navy has broad power to consider the conduct of members of the Naval Reserve not on active duty in establishing the types and conditions of discharge.

The 1947 Bureau of Naval Personnel Manual, Chapter 6, Section 2, H-6202, provided for discharge of officers of the Naval Reserve on inactive duty for cause; including failure to keep the Bureau of Naval personnel and the district commandant informed of official residence; to reply to official communications; to submit such reports as may be required by the Secretary of the Navy; and obvious lack of interest. (Br. App. 53-54).²

On March 21, 1947 President Truman issued Executive Order No. 9835 (12 Fed. Reg. 1935), establishing a loyalty program within the Federal Government service. Part VI, Item 4 provided:

The Secretary of War and the Secretary of the Navy, and the Secretary of the Treasury with respect to the Coast Guard, are hereby directed to continue to enforce and maintain the highest standards of loyalty within the armed services, pursuant to the applicable statutes, the Articles of War, and the Articles for the Government of the Navy.

To implement the statute and Executive Order 9835, the Secretary of the Navy issued SECNAV Letter January 10, 1949, Navy Department Bulletin 49-15, "Separation or Rejection for Naval Service, of Persons whose Conduct or Associations Cast Doubt upon their loyalty" (Br. App. 45-52); and the Chief of Naval Personnel issued Circular Letter No. 4-49, of January 10, 1949, Navy Department Bulletin 49-27, entitled "Procedure

² "Br. App." refers to the appendix to this brief.

with Regard to Naval Personnel and to Applicants for Enlistment or Appointment whose Previous Conduct or Associations Cast Doubt upon their Loyalty". (J.A. pp. 35-45). These two directives established administrative means and procedures for separating from both active and reserve Naval service those individuals whose conduct or associations cast doubt upon their loyalty.

The Secretary's authority to establish the Navy Board for correction of Military Records is in 10 U.S.C. 1552, which reads, in part:

"(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later. However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice."

The Secretary's authority to establish the Navy Discharge Review Board is in 10 U.S.C. 1553, which reads, in part:

"Review of discharges and dismissals.

(a) There is in each military department, and in the Coast Guard when it is not operating as a service in the Navy, a board of review established by the Secretary of that department after conference with the Administrator of Veterans' Affairs. Each such

board has five members, and shall review, on its own motion, upon the request of any former member of an armed force, or in the case of a deceased member or former member of an armed force, upon the request of his surviving spouse, next of kin, or legal representative, the type and nature of the discharge or dismissal of such member or former member, unless such discharge or dismissal resulted from the sentence of a general court-martial. Such review shall be based upon all available records of the military department concerned, or the Coast Guard, relating to the member or former member, and such other evidence as may be presented. Witnesses shall be permitted to present testimony either in person or by affidavit, and the person requesting review shall be allowed to appear before such board in person or by counsel.

(b) Each board shall have authority, except in the case of a discharge or dismissal resulting from the sentence of a general court-martial, to change, correct, or modify any discharge or dismissal and to issue a new discharge in accord with the facts presented to the board. The findings of each board shall be subject to review only by the Secretary concerned.

(c) No review is authorized under this Section unless application therefor is filed with the proper board within fifteen years after whichever last occurred, (1) the date of the discharge or dismissal sought to be reviewed, or (2) June 22, 1944."

STATUTES AND REGULATIONS INVOLVED

The Naval Reserve Act of 1938, 52 Stat. 1176, 34 U.S.C. 853(d) is set out at pp. 8-9 of this brief; 10 U.S.C. 1552, and 10 U.S.C. 1553 are set out at pp. 10-11. The relevant portion of Executive Order 9835, 12 Fed. Reg. 1935, is set out at p. 9.

Letter dated January 10, 1949, Navy Department Bulletin 49-15, is appended to this brief at pp. 45-52. Circular Letter No. 4-49, January 10, 1949, Navy Department Bulletin 49-27 is set forth in the Joint Appendix at pp. 35-45. Bureau of Naval Personnel Manual,

Art. C-10334 is set out in the Joint Appendix at pp. 46-49. Bureau of Personnel Manual, Art. H-6202 is appended to this Brief at pp. 53-54. Relevant provisions of the Regulations of the Navy Discharge Review Board, 32 C.F.R. 724.15(e) (1) and 724.15(e) (4), are set out at pp. 42-43, *infra*.

SUMMARY OF ARGUMENT

I. The Naval Reserve Act of 1938, 52 Stat. 1175, 34 U.S.C. 853(d), in force at the time of appellant's discharge, placed in the Secretary of the Navy the discretion to determine the kind of discharge to be given. The ultimate decision was then and now is his and the Court does not have jurisdiction to direct or interfere with the exercise of his discretion. Further, the decision of the Secretary under 10 U.S.C. 1552 and 10 U.S.C. 1553 is within his discretion.

Judicial review is limited to determining whether the Secretary acted within the sphere of his legal and constitutional authority.

II. The Secretary of the Navy acted within the scope of his authority in issuing appellant's discharge under the Naval Reserve Act of 1938, and under Executive Order 9835, as implemented by Navy Department Bulletin 49-15 and Navy Department Bulletin 49-27. It is for the President, or his delegated subordinate, to estimate the risk or danger to the government involved with respect to employment of members of the Communist Party. Under the statute and regulations appellant was afforded an opportunity to explain his conduct, "to be heard" on the charges; upon his failure to answer interrogatories or specifically refute or explain the allegations he was afforded an opportunity for a personal hearing before a board of officers. He waived this hearing. All of the procedural requirements provided by statute and regulations having been complied with, appellant was subject to discharge "for full and sufficient cause". The Secretary reasonably could conclude that his refusal to explain the allegations or to take advantage of the opportunity

of a hearing, was not in keeping with the high degree of trust, confidence, and fidelity reposed in him by his commission as an officer. Appellant's offer to resign under these circumstances did not merit an honorable discharge. An honorable discharge represents the highest award for honest, loyal and faithful service and not a race to resign before discharge. A court cannot substitute its judgment for that of the military authorities as to what constitutes military "honor".

1. Appellant's discharge was based on the record and on the character of his military service. The case does not fall within the scope of *Harmon v. Brucker*, 355 U.S. 579 (1958), and that decision does not "condemn" appellant's discharge. Appellant's conduct on which his discharge was based occurred while he was an officer on active and inactive status in the Naval Reserve and appellant's discharge was based solely on the character of his military service.

2. Under the statute and regulations appellant was afforded procedural rights but he declined them. He thereby waived any rights he may have had to a full confrontation hearing or to question the sufficiency of the hearing proffered. *Fay v. Noia*, 382 U.S. 391, 439. Even though appellant were correct in assuming that he was entitled to a full confrontation hearing under the 1952 regulations, he cannot merely assume that he would have been denied such a hearing. He had the opportunity for a hearing, but he declined it. He cannot excuse his inaction on the ground the hearing would have been a sham.

III. Appellant's discharge under conditions other than honorable did not violate the First Amendment or Substantive Due Process.

1. The Court need not decide the constitutional questions advanced by appellant because it can hold that there was definite statutory authority for appellant's discharge, that appellant was accorded the full extent of his rights, and that he expressly waived a hearing at which he may have been granted full confrontation. *Harmon v. Brucker*, 355 U.S. at 568; *Bland v. Connally*, 110 U.S. App. D.C. 375, 293 F. 2d 852. However, if the Court does con-

sider appellant's constitutional arguments they should fail, for the following reasons.

2. The Navy discharge program did not attempt to regulate speech or association. The regulations were directed toward eliminating from the Naval Reserve individuals who were of doubtful loyalty and might therefore betray their trust in times of peril with resultant damage to the national security. Any impingement of freedom of speech and association was an indirect result, against which stood the imperative need recognized by Executive Order 9835, that all personnel in the armed forces must meet the highest standards of loyalty and trustworthiness as they constitute the sensitive front line of our national defense. Such regulatory programs, when found justified by valid governmental interests, have been held not violative of First or Fourteenth Amendment rights.

Under the Navy directive membership or participation alone in a proscribed organization did not conclusively establish disloyalty, but were merely one factor to be considered. Thus, the regulation recognized that membership might be innocent and might be explained, and the Navy provided procedures to enable a reservist to disprove any charges against him.

The purpose of the discharge program was preventive and not punitive and it pertains to a sensitive area of our national defense.

The decisions on which appellant relies do not support his argument that no justification for governmental deterring of membership in the Communist Party exists without the elements of guilty knowledge, intent and participation.

3. The law and the facts of the instant case establish that appellant's less than honorable discharge did not constitute punishment.

4. The Secretary's action did not violate Substantive Due Process. Appellant was discharged by reason of doubt cast on his loyalty to the United States by the allegations of Communist Party membership, attendance

at meetings and financial contributions, plus his failure to affirm, deny, explain or refute such allegations or to avail himself of the opportunity for a personal hearing. Since appellant's discharge was based on his failure to answer, it cannot be said that his discharge was so arbitrary or discriminatory as to violate substantive due process. The type of discharge had a real and substantial relationship to the object to be achieved.

IV. The decisions of the review board and the Secretary were fully supported in law and in fact, and, since there has been no showing that the defendant acted arbitrarily or capriciously, and, therefore, unlawfully, the findings should not be disturbed.

ARGUMENT

I. The Court has Jurisdiction only to Determine Whether the Secretary Acted within his Authority

The statute (Naval Reserve Act of 1938, 52 Stat. 1175, 34 U.S.C. 853(d) (1946), in force at the time of appellant's discharge) placed in the Secretary of the Navy the discretion to determine the kind of discharge to be given. The ultimate decision was then and now is his and the Court does not have jurisdiction to direct or interfere with the exercise of his discretion.

When Congress authorized the Secretary to establish a board to review the type and character of discharges it specifically provided that the findings of such a board should be final subject only to review by the Secretary of the Navy. 58 Stat. 286, as amended, 38 U.S.C. 693h, now 10 U.S.C. 1553. (*Supra*, 10-11) This Court has held that military administrative findings relevant to discharge from the service do not fall within the scope of judicial review. *Gentila v. Pace*, 90 U.S. App. D.C. 75, 193 F. 2d 924, cert. denied, 342 U.S. 943.

Also, the statute creating the Navy Board for Correction of Military Records, 10 U.S.C. 1552 (*supra*, p. 10), provides that the Secretary, under procedures established by him, acting through the Board, *may* correct any mili-

tary record of his department "when he considers it necessary to correct an error or to remove an injustice." Here, too, the action is within the discretion of the Secretary.

Judicial review of administrative decisions and actions is limited to determining whether or not the Secretary acted "within the sphere of his legal and constitutional authority." *United States v. Eliason*, 16 Pet. 291, 302; *Harmon v. Brucker*, 355 U.S. 579. Accordingly, the courts recognize that their jurisdiction extends only to the power to construe the statutes involved to determine whether or not the Secretary exceeded his powers. *Harmon v. Brucker*, *supra*, 355 U.S. at 582; *United States ex rel French v. Weeks*, 259 U.S. 326, 335; *Reaves v. Ainsworth*, 219 U.S. 296, 304; *Nordmann v. Woodring*, 28 F. Supp. 573 (D.C. W.D. Okla.); and *Palmer v. United States*, 72 Ct. Cl. 401, 406. The Court has no jurisdiction to tell the Secretary what sort of discharge he shall give. *Ingalls v. Brown* (1967), — U.S. App. D.C. —, 377 F. 2d 151.

Van Bourg v. Nitze, decided by this Court October 17, 1967, — U.S. App. D.C. —, 388 F. 2d 557, was remanded because of a procedural deficiency. The Court recognized that the jurisdiction of the Court in such cases is limited to determining whether the Secretary acted within the sphere of his statutory and constitutional authority. The Court refused to order a change in the discharge from less than honorable to honorable, because "This is a matter for the Review Board—but in a proceeding conducted in accordance with its regulations." (at p. 566)

II. The Secretary of the Navy Acted Within the Scope of his Authority in Issuing Appellant's Discharge

Under the statute in effect at the time, the Naval Reserve Act of 1938 (*supra* 8-9) the Secretary, in his discretion, may discharge an officer of the Naval Reserve in the same manner as an officer in the regular Navy. E.O.

9835 directed the Secretary to maintain the highest standards of loyalty within the armed forces. An officer in the Reserve necessarily must meet the standards of loyalty just as an officer in the regular Navy. Both reserve and regular Navy officers were subject to Navy Department Bulletin "49-15". Separation or Rejection for Navy Service of Persons Whose Conduct or Associations Cast Doubt upon their Loyalty" (Br. App. 45-52). And Navy Department Bulletin "49-27. Procedure with Regard to Navy Personnel and to Applicants for Employment or Appointment whose Previous Conduct or Associations Cast Doubt upon their Loyalty". (J.A. 35-45). It is for the President, or his delegated subordinate, to estimate the risk or danger to the government service involved with respect to employment of members of the Communist Party. *Bailey v. Richardson*, 86 U.S. App. D.C. 248, 182 F. 2d 46 (1950), affirmed 341 U.S. 918 (1951).

In accordance with the statutory provisions of the Naval Reserve Act of 1938 and the regulations, appellant was afforded an opportunity to explain his conduct—"to be heard" on the charges—prior to any action being taken looking toward his separation "for full and sufficient cause." When appellant failed to answer the interrogatories, or to specifically refute or explain the allegations, he was afforded an opportunity for a personal hearing before a board of officers. (J.A. 24). Appellant waived this hearing. (J.A. 25). At this point, all of the procedural requirements provided by the statute and regulations had been complied with and appellant was subject to discharge "for full and sufficient cause."

Congress has traditionally left the power of specifying particular types or conditions of discharge to the appropriate Secretary of the military establishment. *Beard v. Stahr*, 200 F. Supp. 766 (D.C., 1961), vacated on other grounds 370 U.S. 41 (1962); *Ives v. Franke*, 106 U.S. App. D.C. 203, 271 F. 2d 469 (1959); *Gentila v. Pace*, 90 U.S. App. D.C. 75, 193 F. 2d 924 (1951), cert. denied 342 U.S. 943 (1952); *Patterson v. Lamb*, 329 U.S. 539,

542 (1947); *Davis v. Woodring*, 72 U.S. App. D.C. 83, 111 F. 2d 523 (1940); *Reid v. United States*, 161 Fed. 469 (S.D.N.Y.), writ of error dismissed, 211 U.S. 529 (1809); and *United States v. Kingsley*, 138 U.S. 87 (1990). There were no other statutory restrictions in existence at the time as to the manner in which or the type of discharge to be administratively awarded appellant. Appellant was therefore given a discharge (under conditions other than honorable) pursuant to the following applicable regulation in BuPers Manual, Chapter 10, Part C-10334:

TYPES OF OFFICER DISCHARGES

(c) Discharge (under conditions other than honorable)—a certificate entitled "Discharge (under conditions other than honorable)", generally will be awarded officers separated otherwise than by dismissal pursuant to sentence of a general court martial, wherever the circumstances prompting separation are not deemed consonant with traditional naval concepts of "honor". * * *

(J.A. 46-49)

Appellant had taken the oath of office as a Lieutenant in the Naval Reserve and had sworn to "support and defend the Constitution of the United States against all enemies, foreign and domestic" and to "bear true faith and allegiance to the same." The allegations against him concerning his involvement in Communist Party activities raised serious questions as to his conduct and character during the period of service. The Secretary reasonably could conclude that his refusal to explain these allegations which he had been told were supported by "credible, concrete and factual evidence," or to answer a set of interrogatories, or to take advantage of the opportunity of a hearing, was not in keeping with the high degree of trust, confidence, and fidelity reposed in him by his commission. Unfavorable inferences could rightly be drawn from his attitude. *Jimenez v. Barber*, 235 F. 2d 922, 924 (C.A. 9,

1956), cert. denied 355 U.S. 903 (1957); *Mahler v. Eby*, 264 U.S. 32, 42 (1924). Nor did appellant's offer to resign under these circumstances merit an honorable discharge. A tendered resignation does not merit an honorable discharge when the person resigning submits it with the knowledge that his improper activities and conduct have been discovered and charges are pending against him. An honorable discharge represents the highest award for honest, loyal, and faithful service and not a race to resign before discharge. Otherwise a premium would be placed on unreliability and untrustworthiness and the connotation of "honorable" would become meaningless. In order to prevent any dilution in the value of an honorable discharge and the resulting impairment of discipline, morale, and efficiency in the armed services, the Navy issued an appropriate discharge, a discharge under conditions other than honorable, because his separation was "not deemed consonant with traditional Naval concepts of honor." A Court cannot substitute its judgment for that of the military authorities as to what constitutes military "honor." *Dunmar v. Ailes*, 230 F. Supp. 87, 90 (D.C., 1964). And certainly the Navy should not be "forced into the dilemma, on the one hand of having to retain a person in the reserves whose reliability in relation to national security may be in doubt or, on the other, of terminating his service with the accolade of 'honorable' upon his record." *Olenick v. Brucker*, 173 F. Supp. 493 (D.D.C., 1959), rev'd and remanded on other grounds 107 U.S. App. D.C. 152, 273 F. 2d 819 (1959). The inevitable result of having to give an honorable discharge under such circumstances would be to impair discipline and morale and to that extent to lower the efficiency of the armed services.

The Court in *Bland v. Connally*, *supra*, 110 U.S. App. D.C. 375 at 381, 293 F. 2d 852 at 856, recognized that

* * * The deterrence of actually subversive contacts by inactive reservists and the need to prevent dilution of the value of an honorable discharge are both meritorious objectives. * * *

In order to maintain the morale and efficiency of the armed forces and excellent quality of performance, character and conduct must be exacted from officers. The safety of the nation depends upon the nature of the leadership of the officers and the highest standards are indispensable in the interest of the national defense. "They cannot be secured by the courts. Insofar as possible, the Commander-in-Chief and the officers acting under him, must be left untrammelled and unfettered to keep the armed forces on a high level at all times." *Beard v. Stahr*, 200 F. Supp. 766, 773 (D.C. 1961), vacated on other grounds 370 U.S. 41 (1962).

In view of the foregoing, it is respectfully submitted that in 1952 the Secretary had legal authority to issue appellant a discharge under conditions other than honorable.

As we have shown, the Secretary's discharge of appellant under conditions other than honorable for the good of the service did not offend the requirements of *Harmon v. Brucker*, *supra*, 100 U.S. App. D.C. 190, 243 F. 2d 613, that the type of discharge is to be determined by the military record and that the type of discharge should "reflect accurately the nature of the service rendered". The subversive activities cited by the Secretary as the basis of appellant's discharge warranted the doubt as to his loyalty to the government of the United States, a very necessary component of the service rendered as an officer in the Navy. The Secretary did not exceed his authority when he determined that on appellant's "record of military service", the "character of his military service" was less than "honorable".

1. *Appellant's discharge was based on the record and on the character of his military service.*

This case does not fall within the scope of the Supreme Court's decision in *Harmon v. Brucker*, 355 U.S. 579 (1958), and *Harmon* does not "condemn" appellant's discharge as is claimed by the appellant. (Br. 9). That case held that consideration by the Secretary of the Army

of petitioner's *pre-induction activities* to determine the character of discharge was in excess of his powers as conferred by statute and therefore his action discharging petitioner with a less than honorable discharge could not be sustained in law. Appellant's conduct on which his discharge was based occurred while he was an officer on active and inactive status in the Naval Reserve and appellant's discharge was based solely on the character of his military service.

The subversive activities cited in the narrative statement (J.A. 15-16) sent to appellant July 31, 1951, included Communist Party membership since 1946 and participation in Communist Party functions and contributions to support Party activities since 1946 and in 1947, 1948 and 1949, all of which the Secretary deemed to be conduct casting doubt upon his loyalty as measured by Executive Order 9835. During this time appellant was on active duty from July 10, 1946 to June 8, 1948 and on inactive duty in the Naval Reserve from June 8, 1948 to June 1, 1950, when, at his request he was transferred to the United States Naval Reserve Officer Inactive Status List.

As an officer in the Naval Reserve appellant was in the Navy and subject to the lawful jurisdiction and control of the President and the Secretary of the Navy over such reservists.

While plaintiff did receive a release from active duty "under honorable conditions" and a "Certificate of Satisfactory Service," this was not a formal final judgment passed by the Government upon his entire military record, *United States v. Kelly*, 82 U.S. (15 Wall.) 34, 36 (1873), but was merely a transfer from active duty within the reserve. (Cf. *Denby v. Berry*, 263 U.S. 29, 33 (1923)). Having entered into a military status appellant remained in that status until the formalities of his final discharge from the service had been completed. *In Re Grimley*, 137 U.S. 147, 152 (1890).

The Naval Reserve is a "component part" of the Navy and has long been so defined by Congress. See Act (of

February 28, 1925) to Provide for the Creation, Organization, Administration and Maintenance of a Naval Reserve and a Marine Corps Reserve, 43 Stat. 1080; the Naval Reserve Act of 1938, 52 Stat. 1175; the Armed Forces Reserve Act of 1952, 66 Stat. 481, 483, 50 U.S.C. 922; and the present Armed Forces Act of 1956, 70A Stat. 10, 10 U.S.C. 261.

Under Section 5 of the Naval Reserve Act of 1938, 52 Stat. 1176, appellant was subject to being "ordered to active duty by the Secretary in time of war or when in the opinion of the President a national emergency exists . . ." Presidential proclamation No. 2914, December 16, 1950, 64 Stat. A454, proclaiming the existence of a national emergency was in effect at the time of appellant's discharge.

Under Section 308 of the Naval Reserve Act of 1938, 52 Stat. 1182, appellant was also required to ". . . be examined physically once every four years or oftener, as may be deemed necessary . . ."

When appellant at his request was transferred to the United States Naval Reserve Officer Inactive Status List (established pursuant to Title III, Public Law 810, 80th Congress, c. 708, 62 Stat. 1088, former Title 34, United States Code, Section 440, *et eff*) effective June 1, 1950, he was specifically advised that he was subject to be called to active duty in the event of any future national emergency, and was informed of two of his continuing responsibilities: "(1) advising the Commandant of any change of address, and (2) completing and submitting the Annual Qualifications Questionnaire (Form NavPers 319)." Appellant recognized the Secretary's lawful jurisdiction over him as shown, by his submission of the Annual Qualification Questionnaire on September 3, 1950 in which he described his civilian experience and indicated the type of assignment for which he considered himself best suited in the event of a national mobilization.

The distinction between pre-induction activities condemned in *Harmon v. Brucker*, 355 U.S. 579 (1958); and

the reserve activities considered here was recognized in *Olenick v. Brucker*, 173 F. Supp. 493 (D.D.C., 1959),³ when the District Court stated, at 495:

* * * As a member of the Ready Reserve of the Army, plaintiff argues that he is in all respects a 'civilian' and thus not subject to what is, in effect, a punitive discharge based on activity carried on while in reserve status, since 'the type of discharge to be issued is to be determined solely by the soldier's military record in the Army.' *Harmon v. Brucker*, 1958, 355 U.S. 579, 583, 78 S.Ct. 433, 435 2 L.Ed.2d 503.

The quoted language in the *Harmon* opinion, however, was used in disapproving a less than honorable discharge based on activities and associations *prior to induction*. This is the factor that distinguishes *Harmon* from the present case. Prior to induction into the military service as well as after discharge, it is clear that a person is a 'civilian' and in no sense subject to military regulation. *Harmon v. Brucker, supra. United States ex rel. Toth v. Quarles*, 1955, 350 U.S. 11, 76 S. Ct. 1, 100 L. Ed. 8. However, between induction and discharge, the individual is subject to military control to a greater or lesser degree. When he is on active duty, he is subject to the daily beck and call of his military superiors. The reservist on inactive duty, on the other hand, is in a status of relatively reduced military responsibility. But he has an obligation to maintain himself in a state of readiness for full-time military service.

That subversive activity engaged in while in an inactive reserve status may be properly considered as "records of military service" under the holding of the *Harmon* case is also evident from the Court of Appeals decision in *Bland v. Connally*, 110 U.S. App. D.C. 375, 293 F. 2d 852 (1961). The *Bland* case did not hold, as implied by appellant, that the Secretary lacked statutory authority to issue a discharge under conditions other than honorable

³ Reversed and remanded on other grounds, 273 F. 2d 819.

to an inactive reservist for alleged subversive conduct engaged in while in an inactive status, but it held *only* that the Secretary lacked such authority where he did not permit the reservist to confront the witnesses against him. The Court directed that any future administrative proceedings against Bland be conducted with the procedural safeguards referred to in the opinion. 110 U.S. App. D.C. at 383, 293 F. 2d at 860.

Similarly, the basis for the Court's holding in *Davis v. Stahr*, 110 U.S. App. D.C. 383, 293 F. 2d 860 (1961) was also procedural. There the Court held that the Secretary of the Army did not have the statutory authority to issue a less than honorable discharge to an inactive reservist for refusal to discuss alleged derogatory remarks made about the United States Government and the Army of the United States while on active duty *without* permitting the reservist to confront his accusers.

Thus where all procedural rights are observed, as will be shown in this case, there is nothing in the Supreme Court's holding in *Harmon* or in the Court of Appeals holdings in *Bland* and *Davis* which prohibits the Secretary from considering appellant's subversive activity while in an active and inactive reserve status as "records of his military service" and thus relevant to the character of his discharge.

2. Appellant was afforded procedural rights and he waived any rights he may have had at a full confrontation hearing or to question the sufficiency of the hearing proffered.

A. Appellant was afforded procedural rights.

The Naval Reserve Act of 1938 provided that "within a reasonable time prior to discharge for cause, officers shall be given an opportunity to be heard. . . ."

Under the Naval regulations then in effect (Cir. Let. No. 4-49; J.A. 35-45), appellant was afforded every opportunity "to be heard" prior to his discharge *including* the opportunity for a hearing. He was fully advised of

the allegations against him, furnished an opportunity to submit written replies to interrogatories or any other statement concerning the matter, and when the statement which he submitted was considered not to satisfactorily explain the allegations, he was given an opportunity to appear before a local board of officers. (Letters to appellant July 31, 1951 and May 23, 1952; J.A. 11-14 and J.A. 4-6).

Appellant was accorded the full extent of his rights under the statute and regulations. He was in effect offered the same procedural rights as civilian employees of the Government then being processed under the loyalty program established by Executive Order No. 9835, *supra*. These procedures were upheld in *Bailey v. Richardson*, 86 U.S. App. D.C. 248, 182 F. 2d 46 (1950), affirmed by an equally divided court 341 U.S. 918 (1951).

B. *Appellant waived any rights he may have had to a full confrontation hearing or to question the sufficiency of the hearing proffered.*

Appellant with advice of counsel waived the opportunity for a hearing. (J.A. 22-23, 25-26). Thus he also waived all the procedural rights which otherwise might have been available to him in connection with such a hearing.

Appellant also seeks to negate his express waiver on the grounds that the provisions would not have afforded him full confrontation.

In his letter of June 13, 1952 to the Commandant he said:

1. Having duly considered with the advice of counsel the allegations of disloyal conduct as outlined in reference (a) the nature of the proposed hearing as described in reference (b) I do not desire a hearing.

We know of no United States Supreme Court decision holding that confrontation and cross-examination are constitutionally required in administrative hearings. *Unglesby v. Zimny*, 250 F. Supp. 714, 715-716 (N.D. Calif.,

1965). *Greene v. McElroy*, 360 U.S. 474 (1959), did not so hold. There the Supreme Court held that the Secretary of Defense could not establish an industrial security clearance program applicable to civilians that denied the traditional safeguards contained in the Fifth and Sixth Amendments and operated to deprive a civilian of the right to follow his chosen profession unless the President or Congress, within the sphere of their constitutional powers, decided that such a program was necessary and specifically authorized its employment by Executive Order or statute. And in *Bland v. Connally*, *supra*, 110 U.S. App. D.C. 375, 293 F. 2d 852, the Court of Appeals held that the Secretary of the Navy did not have the statutory authority to issue a less than honorable discharge to an inactive reservist for alleged subversive activity engaged in while in inactive status without permitting the reservist to confront the witnesses against him.

While it has been shown that the procedures followed in this case were specifically authorized by statute, even if appellant is correct in assuming that he was entitled to a full confrontation hearing under the 1952 regulations, he cannot merely assume that he would have been denied such a hearing. Such a conclusion is purely a one-sided conjecture on his part.

The 1957 regulations involved in the *Bland* case specifically provided that investigative reports, confidential informants, and investigative techniques would not be disclosed, and of primary significance in that case, full confrontation was denied under the authority of the regulations and over the objections of Bland.

The regulations involved here, however, contained no such express restriction and the assumption that such a restriction might apply could only be inferred by the provision that "the board shall take into consideration the extent to which any individual before it may have been handicapped by nondisclosure to him of confidential information and sources. . ."

The letter to appellant of July 31, 1951 (J.A. 22-23) specifically advised him as follows:

(4) The Chief of Naval Personnel has caused to be made a careful review of material relating to investigative findings concerning you, and has determined that the material reveals the existence of sufficient concrete factual evidence of conduct or associations on your part of the character described in paragraph 2 of reference (b), that were such conduct or association an offense triable before a court martial, a legally valid specification could be drawn setting forth such offense and a *prima facie* case established by evidence in support of such specification.

Also under the regulations, appellant could challenge any or all of the members of the board for cause; he could request a reasonable postponement to permit obtaining evidence and preparation of his case; he could appear at the hearing and be represented by counsel of his own choice; he could make *ex parte* statements sworn and unsworn a part of the record in his case; and he was entitled to examine and cross-examine all witnesses appearing voluntarily. Before the decision of the local board could become final it was subject to review by the convening authority, a board of review appointed by the Chief of Naval Personnel, and by the Chief of Naval Personnel.

Appellant cannot under these circumstances merely assume that the Navy would have found it necessary to consider secret evidence in his case; that any witnesses against him would not have appeared voluntarily; or that, in the case of any procedural irregularity, proper corrections would not have been made upon timely demand.

Orderly procedure would require that if the appellant, advised by counsel, failed to object to the procedure at the time when the Navy had a chance to do something about it, he should not be permitted to complain some twelve or more years later. Appellant should not be allowed to take advantage of the government's errors while at the same

time ignoring his own failure to safeguard his rights. *Deppe v. Lufkin*, 116 F(2d) 483, 487-488 (C.A. 1).

It would be unfair to permit the appellant to take one course of action in 1951 or 1952 then in 1963 or 1964 to insist that the course of action he rejected earlier be reopened to him. *Johnson v. United States*, 318 U.S. 189, 200-201; *United States v. Tucker Truck Lines*, 344 U.S. 33, 35, 36.

It is not a case of presuming waiver. Short of using the word "waiver" itself, appellant on his own decision and with the advice of counsel, explicitly waived his right to a hearing and all the advantages (and disadvantages) inherent in a hearing. He had an opportunity for a hearing, at which he could appear and "speak his piece" (*United States v. Nugent*, 346 U.S. 1, 6) and make his objections, and he declined it.

If a person, after consultation with competent counsel, understanding and knowingly foregoes the privilege of seeking to vindicate his claims, "whether for strategic, tactical, or any other reasons that can fairly be described" as the bypassing of available procedures, he has waived those rights. "... the standard . . . depends on the considered choice of the petitioner." *Fay v. Noia*, 382 U.S. 391, 439.

In *Van Bourg v. Nitze*, — U.S. App. D.C. —, 388 F. 2d 557 (1967), the Court held that Van Bourg's voluntary tender of his resignation did not constitute a waiver of any rights, since to constitute a waiver there must be an "intentional relinquishment of an existing right". The facts in that case are different from those here. Appellant was notified that he could have a hearing, but he declined. Appellant's decision not to have the hearing was an "intentional relinquishment of an existing right".

Nor can appellant excuse his inaction on the ground the board hearing would have been a sham. That at the time appellant submitted his discharge, he believed that he would not get what he regarded as a fair hearing did not justify him in assuming that such would be the fact.

"* * * We cannot assume the invalidity of a hearing which has not been held or the illegality of questions which have not been asked. * * * *Robeson v. Dulles*, 98 U.S. App. D.C. 313, 314, 235 F(2d) 810, 811, cert. denied 352 U.S. 895. And,

* * * We may not and we will not assume that the consideration of the case by the field board of officers and by appellant's commanding officer and the review by the Enlisted Performance Evaluation Board and by the Chief of Naval Personnel will be but a sham or a 'rubber stamping process.' *Anderson v. MacKenzie*, 306 F(2d) 248, 250 (C.A. 9). See also, *Red River Broadcasting Co. v. F.C.C.*, 69 App. D.C. 1, 6-7, 98 F(2d) 282, 287-288.

III. Appellant's Discharge Under Conditions Other than Honorable did not Violate the First Amendment or Substantive Due Process

1. *No constitutional issues need be decided by the Court.*

As has been noted, the Court of Appeals in *Bland v. Connally*, *supra*, did not decide any constitutional questions. It held only that the Secretary of the Navy did not have the statutory authority to issue a discharge under conditions other than honorable to an inactive reservist for alleged subversive conduct engaged in while in an inactive duty status without permitting the reservist to confront the witnesses against him.

In *Van Bourg v. Nitze*, decided October 17, 1967, — U.S. App. D.C. —, 388 F. 2d 557, the court did not find any violation of a constitutional right, but remanded because of a procedural deficiency. Similarly, this Court need not decide the constitutional questions advanced by appellant here because, as has been shown, it can hold that there was definite statutory authority for appellant's discharge, that appellant was accorded the full extent of his rights, and that he expressly waived a hearing at which he may have been granted full confrontation. Thus, there is no need to decide the constitutional issues presented by a case involving a discharge without adequate

constitutional safeguards. The case can be decided on non-constitutional grounds as should be done wherever possible. *Harmon v. Brucker*, *supra*, 355 U.S. at 568; *Bland v. Connally*, *supra*, 110 U.S. App. D.C. 375, 293 F. 2d 852.

However, even if the Court does consider the constitutional arguments advanced by appellant, his arguments must fail, as we will show.

2. *The Navy discharge program did not attempt to regulate speech or association.*

Appellant argues that what is at stake here is merely the Navy's right to punish or label, and not its right to secure itself against subversives (Br. 12). It is argued further that appellant was "punished not on a finding that he actually was disloyal or did not satisfactorily perform his military duties, but on unadorned findings of political associations from which the Secretary acquired a subjective doubt as to his loyalty" (Br. 13). He also complains that First Amendment and substantive due process were violated because the Secretary made no findings, and there was no basis for finding that appellant knew that the Communist Party had a bad purpose, that appellant subscribed to or participated in or had the intent to further any unlawful activity of the Party, or that he was an active member of the Party.

Appellant's arguments are patently fallacious. The naval regulations did not attempt to regulate speech or association. They were directed toward eliminating from the Naval Reserve individuals who were of doubtful loyalty and might therefore betray their trust in times of peril with resultant damage to the national security. If the effectuation of this objection resulted in the impingement of freedom of speech and association, it was an indirect result. Against this indirect infringement, assuming *arguendo*, that the discharge program infringed even to that extent, stood the imperative need, recognized by Executive Order 9835, *supra*, that all personnel in the armed forces must meet the highest standards of loyalty and trust-

worthiness as they constitute the sensitive front line of our national defense. Of course, this applied equally to reservists as the primary function of the reserves is to maintain qualified men for military emergencies. Such regulatory programs, when found justified by valid governmental interests, have been held not violative of First or Fourteenth Amendment rights. *Konigsberg v. State Bar*, 366 U.S. 36, 50 (1961).

The regulatory program involved here is similar to that in *Garner v. Bd. of Public Works*, 341 U.S. 716 (1951), *Gerende v. Bd. of Supervisors*, 341 U.S. 56 (1951), and *American Communications Association v. Douds*, 339 U.S. 382 (1950), which the Court specifically distinguished in *Speiser v. Randall*, 357 U.S. 513, 527 (1958), and quoted with approval in *Konigsberg v. State Bar*, *supra*, 366 U.S. at 54 as follows:

In these cases . . . there was no attempt directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of governmental concerns. . . . Each case concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety. The principal aim of those statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public.

Appellant's discharge was based on the governing directive which specifically provided that membership or participation *alone* in a prescribed organization did not conclusively establish disloyalty, but was merely one factor to be considered. This directive provided, in part, as follows:

(e) Evidence of membership or participation alone in a prescribed organization is not to be considered of itself as conclusively establishing disloyalty. Despite such membership, it may properly be found upon consideration of the entire record that the individual in question is not disloyal. Membership is a fact to be

considered, but a determination of disloyalty must be made upon the entire record in the case. Provided, however, that such membership or participation, once definitely established, may be deemed sufficient to make out a prima facie case of doubtful loyalty on the part of the person so belonging or participating, requiring affirmative explanation or rebuttal beyond his flat, unsupported, categorical denials.

(Br. App. 51) Thus the Navy regulation recognized that membership might be innocent, might be based on mistake or misunderstanding, or might be explained in some manner that would not bear on loyalty, and the Navy provided procedures to enable a reservist to disprove any charges against him.

There is no constitutional requirement that the regulations limit consideration to the reservist's participation in or knowledge of illegal activities on the part of any of these organizations, or to a specific intent to further the illegal aims of proscribed organizations. *Scales v. United States*, 367 U.S. 203, 226-227 (1961).

The purpose of the discharge program was preventive and not punitive and it pertains to a sensitive area of our national defense. A program which only allowed removal of a reservist caught in an illegal act of sabotage or espionage or to one who could be shown to have a specific intent to engage in the illegal activities of organizations would be totally ineffective. Indeed, those actually caught in illegal acts would be liable to criminal prosecution. The Navy's discharge program was a preventive measure designed to protect the security of the United States by way of retaining in the Naval Reserve only trustworthy and loyal persons.

In *Harmon v. Brucker*, 100 U.S. App. D.C. 190, 197, 243 F. 2d 613, 620 (1957), reversed and remanded 355 U.S. 579 (1958), the Court of Appeals stated:

* * * The Army, in making that determination was not trying to find him guilty of some act or offense. It was trying to determine his character as a security risk *vel non* and his consequent suitability for Army service. * * *

Appellant's reliance on *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *United States v. Robel*, 389 U.S. 258 and *Elfbrandt v. Russell*, 384 U.S. 11, is thus misplaced because these cases involved punitive statutes in non-sensitive areas, where, the court felt, less drastic alternatives were available. According to the Court, a penal statute always must be "narrowly drawn to define and punish specific conduct." And his reliance on *Keyishian v. Board of Regents*, 385 U.S. 589, is misplaced primarily because that case did not involve a sensitive area of national security.

Aptheker concerned Section 6 of the Subversive Activities Control Act of 1950, 50 U.S.C. 785, which provided that when a Communist organization is registered, or under final order to register, it shall be unlawful for any member with knowledge of notice thereof to apply for or use a passport. The maximum punishment for violation of Section 6 was \$10,000 and five years imprisonment. 50 U.S.C. 794(c). The Court held Section 6 unconstitutional on its face because it lacked the "knowing", "active" and "specific intent" elements. The Court, 378 U.S. at 516, pointed to "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." The Court, however, indicated that the loyalty program provided by E.O. 9835 was not constitutionally objectionable, saying (at 512-513):

In determining the constitutionality of § 6, it is also important to consider that Congress has within its power "less drastic" means of achieving the congressional objective of safeguarding our national security. *Shelton v. Tucker*, 364 U.S. [479] at 488. The Federal Employee Loyalty Program, which was before this court in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, provides an example. Under Executive Order No. 9835, membership in a Communist organization is not considered conclusive but only one factor to be weighed in determining the loyalty of an applicant or employee. [Footnote omitted.]

This is precisely the effect which was given to "membership" in this case. In determining that appellant should be given a discharge under conditions other than honorable, the Secretary acted pursuant to E.O. 9835 and Navy Regulations implementing that Executive Order.

In the *Elfbrandt* case, the Court dealt with an Arizona statute which provided that a public employee required to take an oath to support the Federal and State Constitutions and the State laws was subject to prosecution for perjury and to discharge from office if he "knowingly and willfully becomes or remains a member of the Communist Party of the United States or its successors or any of its subordinate organizations" or "any other organization" having for "one of its purposes" the overthrow of the State government where the employee had knowledge of the unlawful purpose. The court, citing *Scales v. United States*, 367 U.S. 203 (1961), *Noto v. United States*, 367 U.S. 290 (1961), and *Aptheker*, held the statute unconstitutional because it did not require a specific intent to further the illegal aims of the organization. The court noted, 384 U.S. at 18, 19 that a penal statute touching rights protected by the First Amendment must be "narrowly drawn to define and punish specific conduct . . ." (quoting from *Cantwell v. Connecticut*, 310 U.S. 296, 311), and pointed to the "danger, of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . ." (quoting from *NAACP v. Button*, 371 U.S. 415 at 432-33).

Keyishian v. Board of Regents, *supra*, involved the positions of school teachers. The Court in *Keyishian* termed academic freedom "a special concern of the First Amendment," 385 U.S. at 603, and specifically noted that, "Mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion from such positions as those held by appellants," 385 U.S. at 606, and reiterated. "These limitations clearly apply to a provision, like § 105(1)(c), which blankets all state employees, regardless of the 'sensitivity' of their positions." 385 U.S. at

607 (emphasis added). Thus, where a sensitive position is involved, specific intent to further the unlawful aims of the organization need not be shown before the individual can be removed or prohibited from occupying the sensitive position. The vice of the statutory scheme held invalid in *Keyishian* was also the "impermissible overbreadth" and "vagueness" of its "regulatory maze," through which the individual teacher was forced to transude. 385 U.S. at 609, 599, 604. No such objections can be made to the Naval program under consideration here.

Moreover, unlike the statutes condemned in *Wieman v. Updegraff*, 344 U.S. 183 (1952), *Aptheker v. Secretary of State*, *supra*, and *Keyishian v. Board of Regents*, *supra*, cited by appellant, the governing naval directive here, provided for full consideration of all information relating to an individual's knowledge, commitment, and purpose in membership, and, in accordance with the regulations, appellant was given every opportunity to present such information, first by means of a written statement and/or answers to a set of interrogatories and then by means of a personal appearance before a board of officers. Appellant did not at any time raise any issue of fact regarding the allegations, and refused to affirm or deny them.

United States v. Robel, 389 U.S. 258 (1967) involved a prosecution under Section 5(a)(1)(d) of the Subversive Activities Control Act of 1950, 50 U.S.C. Section 784 (a)(1)(D), which made it unlawful for any member of a Communist-action organization to engage in any employment in any defense facility. The Court held that the statute runs afoul of the First Amendment, because it sweeps indiscriminately against all types of association with Communist-action groups without regard to the quality and degree of membership, and it was irrelevant that the individual might occupy a non-sensitive position in the defense facility. The Court expressly said that its opinion should not be read to deny Congress the power under narrowly drawn legislation to keep from sensitive position in defense facilities those who would use their positions to disrupt the nation's production facilities. The

Court recognized that "while the Constitution protects against invasion of individual rights, it does not withdraw from the Government the power to safeguard its vital interests".

As we have shown, the decisions on which appellant relies do not support his argument (Br. 13) that no justification for governmental deterring of membership in the Communist Party exists without the elements of guilty knowledge, intent and participation.

3. Appellant's less than honorable discharge did not constitute punishment.

Appellant argues (Br. 12) that what is at stake is the Navy's right to punish or label, and not its right to secure itself against subversives. In *Bland v. Connally*, *supra*, the court used this language, but it did not hold that the discharge of Bland was unconstitutional—it did not reach the constitutional questions. However, we intend to show that the law and the facts of the instant case establish that appellant's discharge did not constitute punishment. *Harmon v. Brucker*, 100 U.S. App. D.C. 190, 243 F. 2d 613 (1957), reversed and remanded 355 U.S. 579 (1958); *United States v. Kingsley* 138 U.S. 87 (1891). As the court said in *Harmon*, 190 U.S. App. D.C. at 197, 243 F. 2d at 620:

* * * Moreover the type of discharge is not punishment in the sense that judicial process is required. No finding of guilt, no loss of liberty are involved. The penalty is the same as that which results from many unhappy experiences. Consideration of such "penalties" must begin in perspective. A discharge from civilian, commercial employment carries penalties in a real sense—stigma, loss of pay, difficulty in subsequent employment; but no one would suggest that an employer cannot discharge an employee without judicial scrutiny. A civilian employee of the government can be dismissed upon charges of a criminal offense without judicial review. The courts do not interfere in such matters. When the same 'penalties' arise from action of military authorities, they do not

thereby become 'punishment' necessitating judicial action.

The courts have held that the purpose of a statute determines whether it is penal. See e.g. *Trop v. Dulles*, 356 U.S. 86, 96 (1958). We have shown that the purpose of appellant's separation from the Naval Reserve and his discharge under conditions other than honorable was not to punish or to stigmatize, but to screen out potentially unreliable military personnel and to specify the character of his service.

The allegations against appellant concerning his involvement in Communist Party activities raised serious questions as to his conduct and character during the period of service. He had taken the oath of office of a Lieutenant in the Naval Reserve and had sworn "to support and defend the Constitution of the United States against all enemies, foreign and domestic" and to "bear true faith and allegiance to the same". His refusal to explain allegations affecting these matters, or to answer a set of interrogatories, was not in keeping with the high degree of trust, confidence, and fidelity reposed in him by his commission. Consequently the character of his service did not reflect "the high traditions of Naval honor". It was to prevent any dilution in the value of an honorable discharge with a resultant loss of morale, discipline, and efficiency in the armed service that the Navy issued the discharge it determined to be appropriate.

Appellant's discharge had a real and substantial relation to the object to be achieved, and was not "punishment" in purpose or in effect.

If appellant has suffered any "stigma" by reason of the discharge given, it is as an incident to an exercise of lawful governmental authority. The fact that a "stigma" may attach does not invalidate the official act nor give the aggrieved a right of redress in the courts. *Bailey v. Richardson*, 86 U.S. App. D.C. 248, 182 F. 2d 46 (1950), affirmed by an equally divided court, 341 U.S. 918 (1951). In *Bailey* the argument was much the same as appellant's here, and the court rejected it.

Furthermore, appellant has not been deprived of any rights or benefits provided by law for honorably discharged veterans.⁴ Appellant's release from active duty status was "under honorable conditions", and he has received all federal and state benefits accruing to him because of this service for which he has applied. See letters from Veterans Administration; State of New York Division of Veterans Affairs; and Commonwealth of Pennsylvania, Department of Military Affairs, (J.A. 50-55). The discharge under conditions other than honorable from inactive status does not operate to deprive appellant of any *state or federal* veterans benefit to which he may be entitled by virtue of his active military service.

4. *The Secretary's action did not violate substantive due process.*

Appellant argues (Br. 14) that there was no necessity for the type of discharge given in view of the fact that appellant was in the inactive reserves and had no military functions at the time of discharge, that if the Secretary wanted to eliminate him from the inactive reserves he could have done so by accepting appellant's resignation, or he could have given appellant an honorable discharge. But it is for the Secretary to decide what kind of discharge to give. See *infra*, 15-16. The Secretary must determine the object to be accomplished and how best to accomplish it for the good of the service. As an inactive reservist appellant was subject to being called to active service in time of emergency. Upon recall to active duty appellant automatically would be eligible for security clearance to have access to "confidential" information, "in the absence of information locally available indicating disloyalty or casting any doubt on the character, integrity, or discretion of subject" and thus would occupy a "sensi-

⁴ The dictum in *Bland v. Connally*, *supra*, 110 U.S.App.D.C. 375, 293 F. 2d 852, that such a discharge from the inactive naval reserve also results in loss of federal and state benefits was based on two law review articles, one of which also described the effects of such a discharge from active military service.

tive" position. (Dept. of Navy Security Manual for Classified Information, Chap. 15, Sec. 1506c.)

The Secretary's letter of July 31, 1952 to appellant gives the basis for the Secretary's action as follows:

This action is taken by reason of doubt cast upon your loyalty to the United States of America as indicated by your membership in, attendance at meeting of, and financial contributions to the Communist Party, USA. Your statement, submitted in response to these allegations, has been reviewed and it is considered that it does not satisfactorily explain or refute the foregoing. It is noted that although you were advised that your statement was not considered satisfactory, you failed to avail yourself of an opportunity afforded you for a personal hearing before a board of officers convened by the Commandant, Fourth Naval District.

Thus, appellant was discharged by reason of doubt cast on his loyalty to the United States by the *allegations* of Communist Party membership, attendance at meetings, and financial contributions, plus his failure to affirm, deny, explain, or refute such allegations or to avail himself of the opportunity for a personal hearing.

As an officer in the Naval Reserve, which was established to provide qualified personnel available for active duty, appellant was under an obligation to respond to all relevant inquiries made by the Secretary that had a bearing on his loyalty, reliability, trustworthiness, and fitness to serve. Inquiries as to his membership in, attendance at meetings of, and financial contributions to the Communist Party, USA had a direct bearing on his loyalty, character, and fitness, and were well within the scope of inquiries the Navy was constitutionally authorized to make. See *Konigsberg v. State Bar*, 366 U.S. 36 (1961); *In Re Anastaplo*, 366 U.S. 82 (1961); *Beilan v. Board of Public Education*, 357 U.S. 399 (1958); *Lerner v. Casey*, 357 U.S. 468 (1958); *Adler v. Board of Education*, 342 U.S. 485 (1952); *Garner v. Board of Public Works*, 341 U.S. 716 (1951); *Gerende v. Board of Supervisors*, 341 U.S.

56 (1951); *Graham v. Richmond*, 272 F. 2d 517 (D.C. Cir., 1959); *Homer v. Richmond*, 292 F. 2d 719 (D.C. Cir., 1961); *Borrow v. FCC*, 285 F. 2d 666 (D.C. Cir., 1960), cert. denied 366 U.S. 904 (1961); and *Blumenthal v. FCC*, 318 F. 2d 276 (D.C. Cir., 1963), cert. denied 373 U.S. 951 (1963).

As stated by the Court of Appeals in *Borrow v. FCC*, 285 F. 2d 666, 668, (D.C. Cir., 1960), cert. denied 364 U.S. 892 (1960):

The underlying premises of Borrow's argument . . . is that membership in the Communist Party is merely a matter of political affiliation. This court has repeatedly pointed out that the President, the Congress, and the Supreme Court have declared in emphatic terms that the Communist movement is a world-wide conspiracy for power, inimical to the peace of the world and to the safety of this country.

In the present state of world affairs adherence to the Communist cause is not merely a political opinion. Membership in the party *vel non* is a proper introductory query in this area; the answer may dispose of the subject, or it may necessitate explanation which, in turn, may or may not be acceptable.

Appellant's statement that he had never advocated the violent or forceful overthrow of the Government or ever associated with any one who had was not a sufficient explanation of his conduct. *Konigsberg v. State Bar*, 366 U.S. 36, 46-47 (1961); *Lerner v. Casey*, 357 U.S. 468 (1958).

In *Lerner v. Casey*, 357 U.S. 468 (1958), the Court said:

Finally, the claim that the statute offends due process because dismissal of an employee may be based on mere present membership in the Communist Party, without regard to the character of such membership, *cf. Wieman v. Updegraff*, 344 U.S. 183, must also fail. Apart from the fact that the statute simply makes membership in an organization found to be

subversive one of the elements which may enter into the ultimate determination as to "doubtful trust and reliability," appellant, as the Court of Appeals viewed the administrative proceedings and as we accordingly treat them here, was not discharged on grounds that he was a party member [but on the basis of appellant's refusal to answer].

And the Court also stated, 357 U.S. at 472:

.... New York [was] constitutionally entitled to conclude from appellant's refusal to answer what must be conceded to have been a question relevant to the purposes of the statute and his employment, cf. *Garner v. Board of Public Works* [341 U.S. 716], that he was of doubtful trust and reliability. Such a conclusion is not "so strained as not to have a reasonable relation to the circumstances of life as we know them. *Tot v. United States*, 319 U.S. 463, 468. This Court pointed out in *Garner* that a government employee can be required upon pain of dismissal to respond to inquiry probing into matters relevant to his employment, and that present membership in the Communist Party is such a matter. See also *Beilan v. Board of Public Education* [357 U.S. 399]. Certainly it is not a controlling constitutional distinction that New York, rather than impose on employees, as in *Garner* and *Beilan*, an absolute duty to respond to permissible inquiry upon threat of dismissal, has in these proceedings held that an employee lacking in candor to his government employer evidences doubt as to his trust and reliability.

Thus appellant's less than honorable discharge was based on the entire record in his case. Since, under the regulations, membership was merely one factor to be considered and appellant's discharge was also based on his failure to answer, it cannot be said that appellant's discharge was so arbitrary or discriminatory as to violate substantive due process. And, as shown above, the type of discharge issued also had a real and substantial relationship to the object to be achieved. Due process demands no more. *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

In view of the foregoing it is respectfully submitted that appellant's discharge under conditions other than honorable was not violative of the First and Fifth Amendments and is legal and valid.

IV. The Decisions of the Review Board and the Secretary of the Navy are Fully Supported and Should not be Disturbed.

It has been shown that the Secretary acted within the scope of his authority in discharging appellant and that appellant was accorded the full extent of his rights in the initiation of his discharge.

This is true also of the review of his discharge by the Navy Discharge Review Board and the Secretary of the Navy under 10 U.S.C. 1553. (A copy of the Navy Discharge Review Board decision is in the Joint Appendix, pp. 29-31).

Under the Board's regulations, a strong presumption of validity must necessarily attach to the original action. As stated in 32 C.F.R. 724.15 (e) (1):

(1) Relevant and material facts concerning the petitioner found by a general or special court-martial (general or summary court-martial under the Articles for the Government of the Navy), or by a court of inquiry or board of investigation where petitioner was in the status of a defendant or interested party, as approved by the reviewing authorities, shall be accepted by the Board as established facts in the absence of manifest error or unusual circumstances clearly justifying a different conclusion.

And as stated in 32 C.F.R. 724.15(e) (4):

(4) In order to warrant a change, correction, or modification of the original document evidencing separation from the naval service, it is incumbent on the petitioner to show to the satisfaction of the Board, or it must otherwise satisfactorily appear, that the original document was improperly or inequitably issued under standards of naval law and discipline existing at the time of such original sepa-

ration or under such standards differing therefrom in the petitioner's favor which subsequent to his separation were made expressly retroactive to separation of the type and character had by the petitioner * * *

Appellant's brief in support of his application to the Board made the same major contentions that he urges in support of this action. His request for a change in the character of his discharge was denied on the following grounds:

After careful consideration of the facts presented in all available records of the Department of the Navy and of the claims and evidence submitted, the Board finds that the discharge was proper and equitable under standards of law and discipline applicable at the time, or since made applicable, and that the discharge accurately reflects petitioner's conduct and character during the period of service which was terminated by the discharge. Not finding sufficient evidence to support a contrary conclusion, the Board concludes that no change, correction or modification should be made in the type or character of the discharge.

DECISION: No change.

It is the decision of the Board that the character of the discharge originally issued is proper and that no change, correction, or modification be made in the Under Conditions Other Than Honorable Discharge.

As has been shown, the decisions of the Board and the Secretary were fully supported in law and fact and since there has been no clear showing that the defendant acted arbitrarily or capriciously and, therefore, unlawfully, the findings should not be disturbed. *Stompados v. United States*, 150 Ct.Cl. 402 (1960); *Harris v. United States*, 150 Ct.Cl. 760 (1960), *Kearney v. United States*, 156 F. Supp. 928 (Ct.Cl., 1957).

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX

49-15—Separation, or rejection for Naval Service, of Persons Whose Conduct or Associations Cast Doubt Upon Their Loyalty

P1-6, 10 January 1949

ACTION: ALL SHIPS AND STATIONS

(Ref.: (a) Executive Order 9835, approved 21 Mar. 1947.)

1. To implement the national policy announced in reference (a) action as set forth below is directed to be taken with respect to active, inactive, and retired personnel of the Navy, Marine Corps, and Reserve components of both, whose conduct or associations cast doubt upon their loyalty. Separation from the naval service of any member thereof on the part of whom such conduct or associations are established shall be in accordance with statutes and regulations authorizing separation under the circumstances involved. Persons whose conduct or associations, either or both during civil life or previous service in the armed forces, cast doubt upon their loyalty will not knowingly be enlisted or appointed in any component of the naval service. Concealment of, misrepresentation as to, or failure fully to divulge, present or previous conduct or associations of the character set forth below, at the time of making application for enlistment or appointment in any component of the naval service, is hereby denominated fraudulent, and action shall be taken in the naval service or the facts made known to appropriate civil authorities as the law may provide in such cases.

2. Conduct for associations which may be considered as establishing reasonable grounds for separation of personnel of the naval service and for rejection of persons seeking to be enlisted or appointed in the naval service shall include, but are not limited to, one or more of the following:

- a. Sabotage, espionage, or attempts or preparations therefor, or intimate and sympathetic association

with or voluntary assistance to persons who the subject of the investigation has reasonable cause to believe may be spies or saboteurs.

- b. Treason, sedition, or writings and acts which can reasonably be considered as intended to encourage seditious or treasonable opinions or actions.
- c. Advocacy of revolution or by force or violence to alter the existing constitutional form of government of the United States, advocacy of revolution or by force or violence to bring about economic, political, or social change.
- d. Intentional unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a classified or nonpublic character.
- e. Acting, attempting to act, or knowingly failing to act when such conduct is calculated to serve the interests of another government in preference to the interests of the United States of America.
- f. Membership in, affiliation with, or sympathetic association with, any foreign or domestic organization, association, movement, group or combination of persons,

(1) Which practices, seeks to practice, or advocates:

- (a) Denial, by force, violence, or intimidation, to any person, group of persons, or class of persons within the United States or territory subject to its jurisdiction, of any right or rights which the Federal Constitution guarantees or protects against encroachment by either or both Federal and State governments.
- (b) Alteration, through or with the aid of force, violence, or intimidation, of the existing form of government of the United States or territory subject to its jurisdiction or of the existing economic, social or political order within it.

- (2) Which (regardless of practice, advocacy, or non-advocacy of any of the tenets set forth in (1) (a) and (b) above) is disclosed by investigation or designated by the Attorney General to be totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

3. Investigations pertaining to matters of a character similar to those specified in paragraph 2 above will be conducted only by representatives of the Office of Naval Intelligence unless otherwise directed by the Navy Department. It shall be the duty, however, of every member of the naval service to report to his commanding officer or to a representative of the Office of Naval Intelligence any information coming to his attention which may indicate a possibility of conduct or association of the character described in paragraph 2 above on the part of any other member of the naval, military, or governmental service. Commanding officers to whom such a report is made shall advise a representative of the Office of Naval Intelligence thereof at the first opportunity. No action should be taken, prior to consultation with a representative of the Office of Naval Intelligence, which might apprise any individual that he is under suspicion, unless security of the command or the national interest render such action imperative. All information received by representatives of the Office of Naval Intelligence (and by commanding officers at places and times where and when representatives of the Office of Naval Intelligence may not be available without unreasonable delay or inconvenience) shall be reported to the Office of Naval Intelligence, Washington, D. C., via such direct channels as best assure minimal publication of such information.

4. Upon receipt by the Office of Naval Intelligence of information relating to possible conduct or associations of

a character similar to those described in paragraph 2 above, that Office shall correlate such information with any other information contained in its files or revealed by investigation relating to the individual or individuals concerned and to the conduct or associations alleged on the part of such individual or individuals. The Office of Naval Intelligence shall then determine, upon full review of the information in its possession, whether there is sufficient credible, concrete, and factual evidence available to establish, prima facie, conduct or associations similar to those set forth in paragraph 2 above on the part of any member or members of the naval service. Where such determination is affirmative, the Office of Naval Intelligence shall prepare a narrative statement of the facts as indicated by investigation relating to each member of the naval service as to whom such determination is made. From such narrative statement there shall be omitted only such matter as can be reasonably demonstrated to have a substantial tendency to disclose the identity of confidential informants or to endanger national security. Such statement shall indicate upon its face that it may be revealed to the individual concerned, his counsel, and naval authorities properly entitled to be cognizant thereof. The Office of Naval Intelligence shall further prepare written interrogatories to be addressed to each member of the naval service concerning whom a statement has been prepared as aforesaid. The interrogatories will be drafted with a view toward giving the individual an opportunity to present, in a logically coherent and factual manner, matter within his knowledge corroborating, explaining, expanding, or tending to refute, assertions made, or inferences arising from assertions made, in the statement concerning that individual. To permit intelligent evaluation of information furnished, intelligence reports (as distinguished from narrative statements) shall include matter concerning informants, descriptive to the maximum extent compatible with preservation of security of the identity of confidential informants. Intelligence reports, statements, and interrogatories shall thereupon be transmitted to the Chief

of Naval Personnel or the Commandant of the Marine Corps, as appropriate, to be employed by them in accordance with the direction hereinafter set forth.

5. Upon receipt of intelligence reports, statements, and interrogatories from the Office of Naval Intelligence, the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, shall cause a careful review to be made of the material thus received, in conjunction with matter filed under their respective cognizance relating to personnel named in such reports as to whom statements and interrogatories have been submitted. The Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, shall determine, upon the basis of the review aforesaid, the following issue as respects each member of the naval service concerning whom a narrative statement and interrogatories have been submitted: Does the material reviewed contain, or reveal the existence of sufficient concrete factual evidence of any act, omission, conduct, or association of the character set forth in paragraph 2, above, on the part of this person, that, were such act, omission, conduct, or association an offense triable before a court martial, a legally valid specification could be drawn setting forth such offense and a prima facie case established by evidence in support of such specification? If this issue be determined in the affirmative, further action may be directed in accordance with procedure prescribed as authorized and directed below; otherwise, action with a view to total separation from the service shall be withheld pending further investigation and supplying of deficiencies noted in the investigative record.

6. The Chief of Naval Personnel and the Commandant of the Marine Corps are hereby authorized and directed to establish and promulgate to the respective branches of the naval service involved detailed procedures for the handling of cases referred to them as hereinabove set forth. Procedure thus established shall be governed by the following broad standards:

- (a) Any person in the naval service as to whom statement and interrogatories have been prepared, as

set forth above, shall, before any further proceedings are instituted, be given an opportunity to review the statement concerning him; to consult such counsel of his own choice as may be available at the time and place; to submit written answers to the interrogatories addressed to him, and to submit such written statements as he may see fit relative to the allegations made concerning him.

- (b) If review of all available information in the case of a particular member of the naval service indicate the case to be susceptible to full and adequate treatment under existing court-martial procedure, trial of such member of the service shall be directed. In this event, procedure shall be as otherwise prescribed for court-martial trials.
- (c) Opportunity shall be afforded to any person in the naval service whose administrative separation therefrom by reason of doubtful loyalty is initiated to appear in person and by counsel before a local board of officers senior to him and to present any cause why he should not be so separated. Reasonable advance written notice of hearing before such a board shall be given such individual.
- (d) Common-law rules of evidence shall not apply to board hearings mentioned in (c) above, but the board may exclude or disregard evidence transcending reasonable bounds of relevancy, competency, or materiality. The board shall take into consideration the extent to which any individual before it may have been handicapped by nondisclosure to him of confidential information and sources, with consequent denial to him of opportunity for investigation, impeachment, rebuttal, or cross-examination. In weighing derogatory information, the board shall take into consideration the factors of recency; relative seriousness; attendant circumstances; whether such information is relevant to the allegations in issue; whether such information was given under oath, and corroboration or lack thereof.

- (e) Evidence of membership or participation alone in a prescribed organization is not to be considered of itself as conclusively establishing disloyalty. Despite such membership, it may properly be found upon consideration of the entire record that the individual in question is not disloyal. Membership is a fact to be considered, but a determination of disloyalty must be made upon the entire record in the case. Provided, however, that such membership or participation, once definitely established, may be deemed sufficient to make out a prima facie case of doubtful loyalty on the part of the person so belonging or participating, requiring affirmative explanation or rebuttal beyond his flat, unsupported, categorical denials.
- (f) Board hearings in cases described in (c) above shall not be trials or adjudications, but shall be directed to the end of obtaining an unbiased opinion of two or more persons as to whether there is or is not ground to doubt the loyalty of a particular individual.
- (g) Local and departmental review of cases described in (c) above shall be provided. Departmental review shall be before boards of persons in the naval service or employ, appointed by the Chief of Naval Personnel and the Commandant of the Marine Corps. Review procedures shall be as prescribed by the Chief of Naval Personnel and the Commandant of the Marine Corps with regard to review of cases involving personnel under their respective cognizance. To the extent such may be reasonably applicable, reviewing officers and boards shall also be guided by standards prescribed for local boards in (d) and (e) above.
- (h) Expenses incurred by individuals in connection with any administrative procedure established shall not be paid or subject to reimbursement by the Government, otherwise than as respects pay and allowances prescribed by law for individuals

who are serving on active duty or who have been retired with pay.

7. No person who admits or who is otherwise believed to have engaged in conduct or associations similar to these set forth in paragraph 2 above shall be enlisted or appointed in any component of the naval service without specific approval of the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate. The Chief of Naval Personnel and the Commandant of the Marine Corps are hereby authorized and directed to promulgate procedures for the examination of applicants for enlistment or appointment in this respect, and for disciplinary or other action to be taken in cases wherein personnel have misrepresented, concealed, or failed fully to divulge, conduct or associations of the character indicated prior to application for enlistment or appointment made subsequent to promulgation of such procedures.

—*SecNav. John Nicholas Brown.*

NAVY DEPARTMENT
Washington, D. C.

Excerpt from the
BUREAU OF NAVAL PERSONNEL MANUAL
Article H-6202

"H-6202. DISCHARGE OF OFFICERS FOR CAUSE.
(C.B.N.M. 13-14).

(1) Officers of the Naval Reserve on inactive duty may be discharged by the Secretary of the Navy for full and sufficient cause, including the following:

- (a) Failure to keep the Bureau of Naval Personnel and the district commandant informed of official residence.
- (b) Failure to reply to official communications.
- (c) Failure to submit such reports as may be required by the Secretary of the Navy.
- (d) Obvious lack of interest.

(2) Within a reasonable time, prior to discharge for cause, under the provisions of this article, officers shall be given an opportunity to be heard by the Secretary of the Navy, or such administrative authority or other agency as he may designate, which opportunity will be considered as having been given through the mailing of notice to their address on file in the Navy Department.

(3) Pursuant to the discretion vested in the Secretary of the Navy by the foregoing provisions, officers under consideration for discharge for cause may submit such statements as they desire to the Chief of Naval Personnel via official channels. In cases of officers about to be recommended for discharge for cause by the Commandant, the officer concerned shall first be notified by the Commandant that such action is contemplated and that he is thereby offered an opportunity to make such statement as he may desire. Officers receiving notification of their pending discharge are also privileged to state their case in person to the Chief of Naval Personnel, or to the Com-

mandant of the naval district, or to such officer attached to the Bureau of Naval Personnel or to the staff of the Commandant of the Naval District, not below the rank of commander, as may be assigned such duty by the Chief of Naval Personnel or the Commandant. The written statement submitted by the officer will be transmitted to the Secretary of the Navy for his consideration, with the letter of the Chief of Naval Personnel recommending discharge.

(4) Officers receiving notification of their pending discharge shall promptly acknowledge same and will be given approximately 30 days, exclusive of the usual length of time required for transmittal of a letter through the mails, in which to prepare a statement or otherwise to be heard. Extensions of time in which to prepare a statement may be granted in the discretion of the Bureau of Naval Personnel."

